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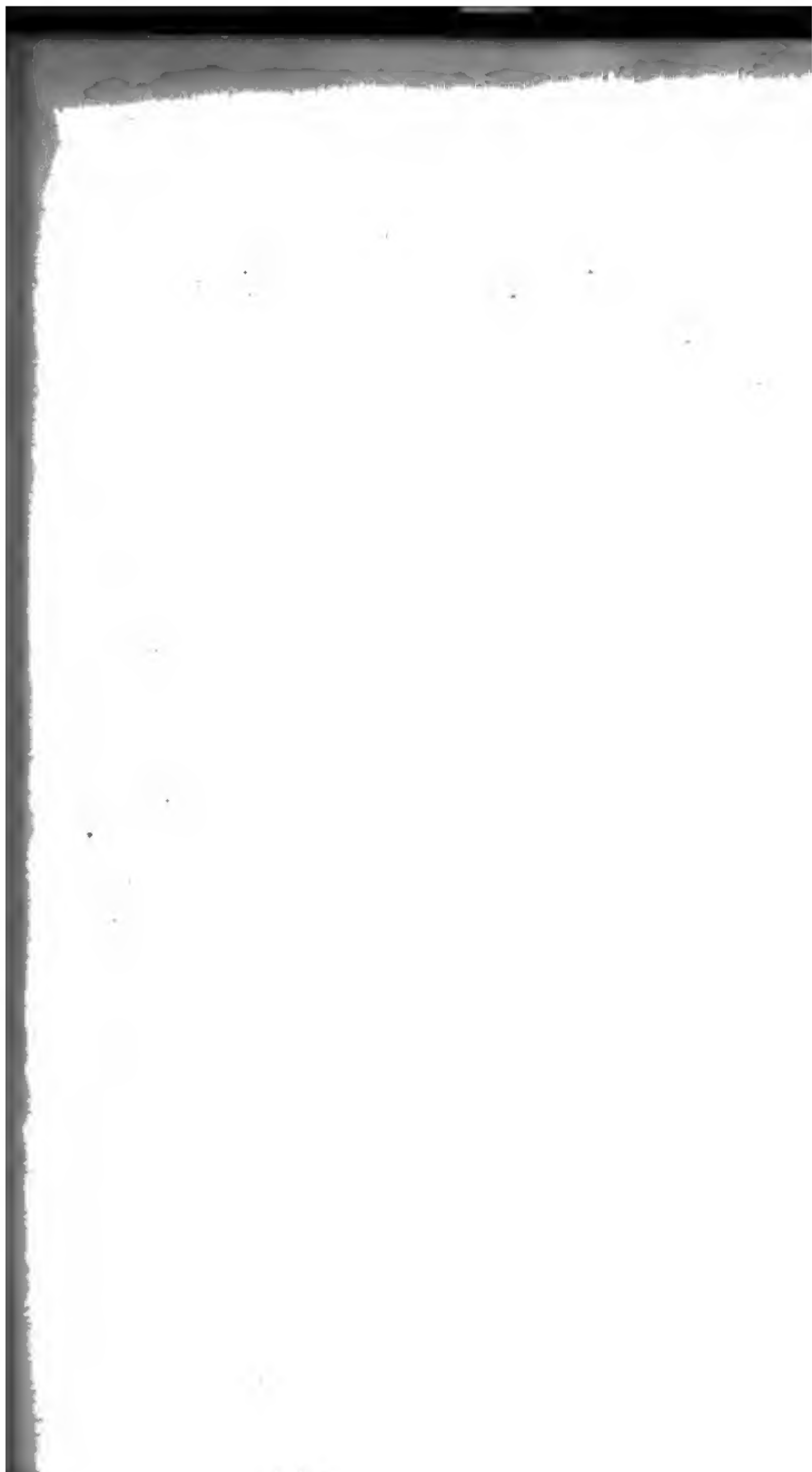




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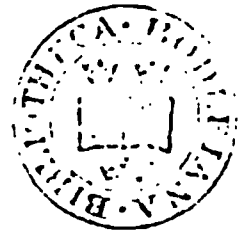


**REPORTS**  
**OF**  
**CASES DETERMINED**  
**IN THE**  
**CIRCUIT COURT OF THE UNITED STATES**  
**FOR THE FIRST CIRCUIT,**  
**FROM MAY TERM, 1867, TO JUNE TERM, 1878.**

**BY**  
**HON. NATHAN CLIFFORD, LL. D.,**

**ASSOCIATE JUSTICE OF THE SUPREME COURT, ASSIGNED TO SAID CIRCUIT.**

**WILLIAM HENRY CLIFFORD,**  
**COUNSELLOR AT LAW,**  
**REPORTER.**



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**JUDGES**  
**OF THE**  
**UNITED STATES COURTS**  
**IN THE FIRST CIRCUIT**  
**DURING THE TIME OF THESE REPORTS.**

---

**HON. NATHAN CLIFFORD, LL. D.,**  
**ASSOCIATE JUSTICE OF THE SUPREME COURT.**

**HON. GEORGE F. SHEPLEY,**  
**CIRCUIT JUDGE, APPOINTED DECEMBER 22, 1869.**

**HON. EDWARD FOX,**  
**DISTRICT JUDGE OF MAINE.**

**HON. DANIEL CLARKE,**  
**DISTRICT JUDGE OF NEW HAMPSHIRE.**

**HON. JOHN LOWELL,**  
**DISTRICT JUDGE OF MASSACHUSETTS.**

**HON. JONATHAN RUSSELL BULLOCK,**  
**DISTRICT JUDGE OF RHODE ISLAND.**  
**RESIGNED AUGUST, 1869.**

**SUCCEEDED BY HON. JOHN P. KNOWLES,**  
**APPOINTED JANUARY 24, 1870.**



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The reporter is indebted to George W. Searle, Esq., of the Suffolk Bar, for the notes, statements, and the report of the briefs and arguments of counsel in United States *v.* Plumer.

# CIRCUIT COURT OF THE UNITED STATES.

## MASSACHUSETTS DISTRICT.

OCTOBER TERM, 1859.

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IN CHAMBERS AT PORTLAND, JULY 2, 1859, BEFORE CLIFFORD, J.

THE UNITED STATES *v.* CYRUS W. PLUMER.\*

A writ of error does not lie from the Supreme Court to the Circuit Court in a criminal case.

THIS was a petition for the allowance of a writ of error in a capital case, and for stay of execution until a hearing could be had in the Supreme Court, on the alleged errors. Plumer, with three others, had been indicted, tried, and convicted in the Circuit Court, Massachusetts District, and sentenced to be executed. A full statement of facts will be found in the opinion of the court.

*Benjamin F. Butler, Geo. W. Searle, and F. F. Heard* appeared as counsel for the petitioner.

*C. L. Woodbury*, District Attorney, and *Milton Andros*, Assistant District Attorney, for the United States.

The material facts of the record were as follows : —

UNITED STATES OF AMERICA.

*Circuit Court of the United States of America, for the District of Massachusetts.*

At a Circuit Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said district, on the 15th of October, A. D. 1858.

\* This case was necessarily omitted from the first volume of the series.



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United States v. Plumer.

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Before the Honorable Nathan Clifford, Associate Justice, and the Honorable Peleg Sprague, District Judge. . . .

[Here follows the indictment.]

The record then proceeds as follows, namely : —

At this present October term of this court, A. D. 1858, said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, were severally set to the bar, and had this indictment read to them ; and thereupon they severally said that thereof they were not guilty ; and thereof for trial put themselves upon God and their country ; and Benjamin F. Butler and Charles P. Chandler were assigned by the court as counsel for said Plumer ; F. F. Heard and F. W. Pelton were assigned as counsel for said Carther ; Thornton K. Lothrop and J. Q. Adams were assigned as counsel for said Herbert ; and J. Hardy Prince and Samuel M. Quincy were assigned as counsel for said Charles H. Stanley, otherwise called John W. Ballard ; and said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, severally acknowledged that they had severally received a copy of the indictment, and a list of the jurors, agreeably to law, and more than two days before the date of their trial.

A jury was thereupon impanelled and sworn to try the issue, namely, John B. Chisholm, foreman, and fellows, namely, Willard Bacon, Daniel C. Bates, Lemuel Grant, Charles Humphrey, Asher Joslin, Charles B. W. Lane, Benjamin Norris, Hiel J. Nelson, William Parker, William Tinker, and Amasa Whiting, all of said district.

And the said jury afterwards returned their verdict that said Cyrus Plumer, otherwise called Cyrus W. Plumer, is guilty of murder as alleged in said indictment ; and William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, are severally guilty of manslaughter ; and thereupon said Cyrus Plumer, otherwise called Cyrus W. Plumer, by his counsel, moves the court for a new trial, as follows : —

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United States v. Plumer.

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[Here follows the motion for a new trial; also the motion in arrest of judgment.]

The record then proceeds as follows, namely : —

Time was allowed by the court for preparation of counsel therein, and the said motions were set down for hearing. And afterwards, at the same term, the counsel of said Plumer moved the court for leave to withdraw the said motions for new trial and in arrest of judgment. And said Cyrus Plumer, otherwise called Cyrus W. Plumer, having been brought into court, and being inquired of personally, asks that such leave may be granted and that the said motions may be withdrawn. Whereupon the court did grant him leave to withdraw the said motions, and the same were accordingly waived and withdrawn by said Plumer; said Plumer was then asked if he had anything to say why judgment of death should not then be pronounced against him. And having replied thereto fully, and no good cause appearing to the contrary, and all matters in the case having been fully heard and understood by the court, it is considered by the court that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, be deemed guilty of felony, and that he, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, be taken back to the place from whence he came, and there remain in close confinement until Friday, the 24th of June next; and on that day, between the hours of eleven o'clock in the forenoon and one o'clock in the afternoon, he, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, be taken thence to the place of execution, and that he be there hanged by the neck until he be dead.

THE PETITION.

UNITED STATES OF AMERICA.

*Circuit Court of the United States of America, for the District of Massachusetts.*

To the Honorable Nathan Clifford, one of the justices of the Supreme Court of the United States, sitting within and for the District of Massachusetts.

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United States v. Plumer.

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Cyrus W. Plumer now imprisoned in the district aforesaid, under sentence of death on a judgment, warrant, process, and proceeding of the said Circuit Court of the United States of America, for the District of Massachusetts, says that there is manifest error in the process, proceedings, premises, and judgment, and feeling aggrieved thereby, assigns as errors in said record, process, and proceeding the errors named and set forth in the paper hereunto annexed, marked "Assignment of Errors."

The said Cyrus W. Plumer, plaintiff in error, begs the court to certify the errors in said assignment named and set forth, and that he may have leave to enter the same in the Supreme Court of the United States at the next December term of said Supreme Court, and that execution and all proceedings in said case, and in the premises, may be stayed until a hearing is had in said court on said assignment of errors.

CYRUS W. PLUMER.

BOSTON, June 30, 1859.

#### ASSIGNMENT OF ERRORS.

#### UNITED STATES OF AMERICA.

*Circuit Court of the United States of America, for the District of Massachusetts.*

Cyrus Plumer, otherwise called Cyrus W. Plumer, plaintiff in error, v. The United States of America, defendant in error.

And now, to wit, on the 30th of June, A. D. 1859, cometh the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in his proper person, who is now imprisoned in the District of Massachusetts, under sentence of death, on a judgment, warrant, process, and proceeding of the said Circuit Court of the United States of America, for the District of Massachusetts, and immediately saith that in the record and process aforesaid, and also in the giving of the judgment aforesaid, against him the said Cyrus Plumer, otherwise called Cyrus W. Plumer, there is manifest error in these, to wit: —

1. That in and by said indictment and record, there is no

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United States v. Plumer.

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sufficient averment that the Circuit Court in which said indictment was returned and heard, had jurisdiction of the offence therein supposed to be charged.

2. That in and by said indictment and record, there is no sufficient averment that the person therein supposed to be injured was within, or under the protection of or jurisdiction of, the United States, or in the peace thereof.

3. That in and by said record it nowhere appears, or is set forth, that said Cyrus Plumer, otherwise called Cyrus W. Plumer, was informed of, or permitted to exercise, or did exercise, his constitutional right of challenge of the jurors returned for his trial.

4. That in and by said record it nowhere appears or is set forth that said Plumer was present, either at the impanelling of the jury that tried him, or at the time said trial was had, or said verdict was rendered against him.

5. That in and by said record it nowhere appears that said Plumer was permitted to be heard by said jury so impanelled, either by himself or his counsel; and that in truth and in fact said Plumer was not permitted to address the jury in his own proper person.

6. That said verdict of guilty was rendered upon all the counts of said indictment, while one or more of said counts are defective and insufficient in law to support any judgment.

7. That it nowhere appears in and by said record of what (if any) felony said Plumer was adjudged guilty.

8. That it nowhere appears by said record of what "felony" the court "deemed" or adjudged the said Plumer to be "guilty."

9. That it nowhere appears by said record for what "felony" said Plumer was sentenced to suffer death.

10. That it nowhere appears in and by said record that Plumer received sentence of death for the particular murder of which the jury had found him guilty; but only for "felony" indefinitely, the particular felony not being described or in any manner designated.

11. That the verdict is repugnant to the general averment and clause in the indictment giving the court jurisdiction.

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United States v. Plumer.

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12. That said indictment does not appear to be signed by the foreman of the grand jury.

13. That it does not appear that the verdict of said jury was rendered in open court, and in the presence of the defendant.

14. That said record is in other respects informal, insufficient, erroneous, and the judgment thereon void and of none effect.

15. That by the said record it appears that judgment upon the indictment aforesaid was given against him, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in form aforesaid, whereas judgment by the said Circuit Court of the United States ought to have been given for the said Plumer that he be thereof acquitted and go thereupon without day. Therefore in that there is manifest error.

And the said Cyrus Plumer, otherwise called Cyrus W. Plumer, prays that the said judgment aforesaid, for the errors being in the record and process aforesaid, may be reversed and annulled, and absolutely be had for nothing, and that he may be restored to the common law of this land, and to all things which he hath lost on the present occasion.

CYRUS PLUMER, otherwise called  
CYRUS W. PLUMER.

BOSTON, June 30, 1859.

BENJ. F. BUTLER, }  
F. F. HEARD,        }  
GEO. W. SEARLE,    } *of Counsel.*

#### MR. SEARLE'S ARGUMENT.

The first proposition we attempt to maintain is this, that, as the acts of Congress now stand, the Supreme Court is constitutionally bound to take appellate jurisdiction, in all cases whatsoever, both civil and criminal, arising under the Constitution and laws of the United States, except where it has original jurisdiction, and that the decision of the Supreme Court (*United States v. Moore*, 3 Cran. 159), repudiating appellate jurisdiction in all cases, except where Congress had specially granted it, was erroneous.

In other words, we attempt to maintain that the existing acts of

Congress, if rightly interpreted, make no "exceptions" whatever to the appellate jurisdiction of the Supreme Court, as conferred by the Constitution; and that it is only by false interpretations, that those acts have ever been held to exclude from the appellate jurisdiction of the Supreme Court any case whatever, civil or criminal, arising under the Constitution and laws of the United States, and not included in the original jurisdiction of that court.

This proposition, we claim, is established by the following arguments: —

1st. The entire jurisdiction, both original and appellate, of the Supreme Court of the United States is conferred by the Constitution itself, and not by act of Congress. Constitution, Art. 3, § 2.

The language of the Constitution on this point is: —

1. "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States," etc., etc.

2. "In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.

"In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

2d. The Supreme Court itself has acknowledged that at least its original jurisdiction was conferred by the Constitution itself, and not by act of Congress. Thus they say: —

"Of all the courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses [an original] jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power [Congress] that creates them." *United States v. Hudson*, 7 Cran. 32.

Here the court asserts that at least its original jurisdiction is derived immediately from the Constitution. Yet its appellate

jurisdiction is just as clearly conferred by the Constitution as its original jurisdiction, as the clauses quoted from the Constitution show.

The only difference in the two cases is this, that Congress is authorized, if it see fit, to make "exceptions" and "regulations" as to the appellate jurisdiction, but have no such power in regard to the original jurisdiction.

Until "exceptions" are made by Congress to the appellate jurisdiction conferred by the Constitution, that jurisdiction includes all cases whatsoever, civil and criminal, arising under the Constitution and laws of the United States, etc., except such as are included in the original jurisdiction.

The point we contend for is, that Congress has no power whatever affirmatively to confer appellate jurisdiction on the Supreme Court. It only has a discretionary power to "make exceptions" to the general appellate jurisdiction conferred by the Constitution, and also to "make regulations" by which this general appellate jurisdiction shall be exercised.

The Supreme Court itself virtually acknowledges this proposition. *United States v. Moore*, 3 Cran. 159.

Now we say that inasmuch as a general appellate jurisdiction in all cases, etc., whatsoever, except where the Supreme Court has original jurisdiction, is affirmatively conferred by the Constitution itself; and inasmuch as Congress has no power at all (on this precise point of the courts having appellate jurisdiction), save to "make exceptions" to this general appellate jurisdiction conferred by the Constitution; and inasmuch also as all such "exceptions" are against equality and right, and adverse to the ascertainment of truth and the accomplishment of justice, and also adverse to uniformity and certainty in the law, all such "exceptions" must be expressly and affirmatively made. They cannot be implied from any acts of Congress whatever, much less can they be implied negatively or unnecessarily from any acts of Congress.

We now say further that Congress has never expressly and affirmatively made any "exceptions" whatever to the general appellate jurisdiction conferred upon the Supreme Court by the



Constitution. The Supreme Court itself makes no pretence that any such "exceptions" have been expressly and affirmatively made by any act of Congress.

All that Congress has done is this: it has passed acts purporting affirmatively to confer upon the Supreme Court appellate jurisdiction in certain cases where the same jurisdiction had been previously conferred by the Constitution.

All such grants by Congress, of a jurisdiction already conferred by the Constitution, and already possessed by the court, are obviously gratuitous, extra-constitutional, and void, since (it may be repeated) Congress has no power to confer any appellate jurisdiction at all, but only to "make exceptions" to the appellate jurisdiction conferred by the Constitution.

And yet, from these gratuitous, extra-constitutional, and void grants by Congress of an appellate jurisdiction (already conferred by the Constitution itself, and already possessed by the court) in certain cases, the court has implied, and that too, negatively and unnecessarily, an "exception" to, or denial of, the appellate jurisdiction conferred by the Constitution in all other cases.

And this negative and unnecessary implication from these gratuitous, extra-constitutional, and void grants by Congress of an appellate jurisdiction in certain cases, constitutes the only ground on which the court now repudiates the appellate jurisdiction conferred upon it by the Constitution in all other cases. *United States v. Moore*, 3 Cran. 159.

Now we insist that the appellate jurisdiction conferred upon the Supreme Court by the Constitution itself—a jurisdiction so important, not merely to uniformity and certainty in the law, but also to equality, truth, justice, and right—cannot be taken away by any such negative and unnecessary implication, from extra-constitutional and void acts of Congress; but that it can be taken away only by constitutional and valid acts of Congress specially and affirmatively "making exceptions" to the general appellate jurisdiction conferred by the Constitution.

But let us see what is the argument of the court in favor of this implication. We give their opinion entire.

Marshall, C. J., delivered the opinion of the court as follows : —

“ This is an indictment against the defendant for taking fees, under color of his office, as a justice of the peace, in the District of Columbia.

“ A doubt has been suggested respecting the jurisdiction of this court, in appeals on writs of error, from the judgments of the Circuit Court for that district, in criminal cases ; and this question is to be decided before the court can inquire into the merits of the case.

“ In support of the jurisdiction of this court, the Attorney-General has adverted to the words of the Constitution, from which he seemed to argue that as criminal jurisdiction was exercised by the courts of the United States, under the description of ‘ all cases ’ in law and equity, arising under the laws of the United States, and as the appellate jurisdiction of this court was extended to all enumerated cases, other than those which might be brought on ‘ originally,’ ‘ with such exceptions and under such regulations, as the Congress shall make,’ that the Supreme Court possessed appellate jurisdiction in criminal as well as civil cases, over the judgments of every court, whose decisions it would review, unless there should be some one exception or regulation made by Congress, which should circumscribe the jurisdiction conferred by the Constitution.

“ This argument would be unanswerable, if the Supreme Court had been created by law, without describing its jurisdiction.

“ The Constitution would then have been the only standard by which its powers could be tested, since there would be clearly no congressional regulation or exception on the subject.

“ But as the jurisdiction of the court has been described, it has been regulated by Congress, and an affirmative description of its powers must be understood as a regulation, under the Constitution, prohibiting the exercise of other powers than those described.

“ Thus the appellate jurisdiction of this court, from the judgments of the Circuit Courts, is described affirmatively. No

restrictive words are used. Yet it has never been supposed that a decision of a Circuit Court could be reviewed, unless the matter in dispute should exceed the value of \$2,000. There are no words in the act restraining the Supreme Court from taking cognizance of causes under that sum; their jurisdiction is only limited by the legislative declaration, that they may re-examine the decisions of the Circuit Courts, when the matter in dispute exceeds the value of \$2,000.

“The court, therefore, will only review those judgments of the Circuit Court of Columbia, a power to re-examine which is expressly given by law [act of Congress].

“On examining the act ‘concerning the District of Columbia,’ the court is of opinion that the appellate jurisdiction granted by that act is confined to civil cases.

“The words ‘matter in dispute’ seem appropriated to civil cases, where the subject in contest has a value beyond the sum mentioned in the act. But in criminal cases, the question is the guilt or innocence of the accused. And although he may be fined upwards of \$100, yet that is, in the eye of the law, a punishment for the offence committed, and not the particular object of the suit.

“The writ of error, therefore, is to be dismissed, this court having no jurisdiction of the case.” *United States v. Moore*, 3 Cran. 159.

This argument of the court has two palpable fallacies, inconsistent with each other, yet either of them sufficient to defeat the conclusion arrived at. The court attempt to blend these two fallacies. Or rather, they fly from one to the other, as occasion requires, as if to avoid being caught in either. The fallacies are these:—

1. One part of their argument seems to assume that the appellate jurisdiction of the Supreme Court is derived from the act of Congress, instead of the Constitution; and that the court can therefore have no appellate jurisdiction, except what the act of Congress confers. Whereas the truth is that its appellate, like its original jurisdiction, is derived wholly from the Constitution, and not at all from the act of Congress; and consequently

exists in all cases enumerated in the Constitution, unless Congress have "made exceptions," or taken it away in specific cases.

2. Another part of their argument seems to assume that their appellate jurisdiction is derived from the Constitution ; and that it therefore necessarily exists in all the cases enumerated in the Constitution, unless Congress have "made exceptions" thereto. So far well. But they then proceed to say that, Congress having affirmatively described this appellate jurisdiction in civil suits, where "the matter in dispute exceeds the value of \$2,000," this simple "affirmative description" of the jurisdiction in those cases "must be understood as a regulation under the Constitution prohibiting" the appeal, not only in all civil suits for a less sum than \$2,000, but also in all criminal cases whatsoever.

How monstrous this reasoning and conclusion are will be seen when it is considered that the "exceptions" and "regulations" which Congress are authorized to make in regard to the appellate jurisdiction of that court are two wholly different things, and have wholly different objects in view. The object of the "exceptions" is to declare that the class of cases included in them shall not be appealed at all.

The object of the "regulations" is to prescribe the conditions under which, and provide the means by which, another class of cases may be appealed. There is, therefore, no analogy whatever between the "exceptions" and the "regulations" which Congress are authorized to make. And yet the court have confounded the two ; and solely on this confusion of the two they base their decision, withholding the appeal.

The language of the Constitution is perfectly clear, as follows : —

"In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

It is here plain that the words "exceptions" and "regulations" mean two different things, because the sole object of the "exceptions" (nobody can doubt) is to particularize what cases shall not be appealed, whereas the "regulations" relate only to those

cases that are to be appealed. This is certain, since it is “under” the “regulations” that cases are to be appealed.

Now contrast the language of the court with this clear language of the Constitution. Thus the court say: —

“But as the jurisdiction of the court has been described, it has been regulated by Congress, and an affirmative description of its powers must be understood as a ‘regulation’ under the Constitution, prohibiting the exercise of other powers than those described.”

Here the court ignore altogether the word “exceptions,” as used in the Constitution, and then assume that it is by “regulations” that certain cases are to be excluded from appeal. Whereas the language of the Constitution is explicit, to wit, that it is by “exceptions” alone that cases are to be excluded from appeal, and that it is “under” (that is, in conformity with, or by means of) “regulations” that other cases are to be appealed.

Suppose the words “with such exceptions” had been left out of the Constitution, and that the clause had read (as it then would have done) thus: —

“In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, under such regulations as the Congress shall make.”

Would Congress then have been authorized to “except” any of the cases enumerated by the Constitution itself from the appellate jurisdiction of the court? Plainly not. They would only have been authorized to make “regulations” “under” which all the cases enumerated by the Constitution might be appealed.

If the words “exceptions” and “regulations,” in this clause, had meant the same thing, the language of the Constitution would not only have been tautological, but the powers granted to Congress would have been widely different from what they are now. If, for example, the two words “exceptions” and “regulations” were to be held to mean the same thing, they must both be held to mean either “exceptions” or “regulations,” for they could not mean the same thing, and yet mean both of these two different

things. If then, the two words "exceptions" and "regulations" were held to mean only "exceptions," Congress would have simply had the power to say that certain cases should not be appealed at all. They would have had no power to prescribe any "regulations" whatever, "under" which cases should be appealed. On the other hand, if the two words were to be held to mean only "regulations," then Congress would have had no power to "make exceptions" of or to prohibit the appeal of any cases whatever. They could only have prescribed "regulations" "under" which all cases whatever might be appealed. But now, by giving different meanings to these two different words, Congress gets two different powers, to wit, first, the power to forbid the appeal of certain cases; and, second, the power to prescribe the "regulations" "under" which all other cases may be appealed.

It being thus established that the words "exceptions" and "regulations," as used in this clause of the Constitution, mean two wholly different things, and grant to Congress two wholly different powers, there is left no foundation whatever for the decision of the court, that the regulations prescribed by Congress, "under" which certain cases are to be appealed, must be considered as "exceptions" prohibiting the appeal of all other cases. These "regulations" apply only to the particular cases to which they purport to apply; and they leave all other cases to stand just as they would have done if the "regulations" had not been made.

These "regulations" governing the appeal in civil suits, where the matter in dispute exceeds \$2,000, cannot legally be construed into "exceptions" prohibiting the appeal even of other civil suits, where less amounts are involved. Still less can they be construed into "exceptions" prohibiting appeals in criminal cases, which are not mentioned, and where not money, but life, liberty, and character are in issue. Such a construction would not only be legally absurd, it would be morally atrocious.

To hold that a regulation prescribing the mode of appeal in a civil suit where \$2,000 are at stake, shall, by implication, be deemed a prohibition upon any appeal in a criminal case, where

one's life is at stake, would be an interpretation of law as ludicrous and grotesque as it would be brutal and inhuman.

It is a maxim of universal application, that all interpretations are to lean to life and liberty. And neither the Supreme Court, nor any other decent court, has any excuse for disregarding, or for pretending ignorance of this maxim. And nothing, it would seem, but deliberate corruption would induce them to disregard it in this case.

If it be asked, what could have been the motive of Congress in providing "regulations" under which the appeal of civil cases, where the amount involved exceeds \$2,000, is to be made, unless it were to exclude all other cases from the right of appeal? One answer is, that we have nothing to do with the private motives of Congress, but only with the legal effect of their enactments, the intentions they have legally conveyed. Another answer is, that it is presumable that Congress may have thought some special "regulations" would be useful or proper in those cases, which would not be useful or proper in other cases.

But perhaps it will be asked, how can any case be appealed, except Congress have first made "regulations" for its appeal?

The answer is, that there are writs and forms of proceeding well known to the law, by which a superior court reviews the decisions of inferior courts; and the Judiciary Act of 1789, § 14, enacts: —

"That all the before-mentioned courts of the United States [including the Supreme Court] shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

This provision alone would be ample to enable the Supreme Court to take appellate jurisdiction in all cases tried in subordinate courts.

In addition to all this, the fifth amendment to the Constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law."

It would seem that no narrower interpretation could possibly



be given to this provision, than that it secures to a defendant, in a criminal case, all processes known to the common law, and appropriate to his case. It includes, for example, trial by jury. No one will deny this. But it also as much secures all other common-law forms of proceeding, as it does this one of trial by jury.

This amendment is subsequent in date to the Constitution, and annuls any part of that instrument that is inconsistent with it.

It may be reasonably questioned, therefore, whether this amendment does not absolutely annul that portion of the Constitution which gave Congress any discretionary power whatever to withhold the right of appeal in any criminal case whatever. At any rate, it is clearly sufficient to condemn all such absurd and preposterous implications as that on which alone the Supreme Court have hitherto refused to take appellate jurisdiction in criminal cases.

There is something marvellous in the obstinacy with which the Supreme Court have refused to take this appellate jurisdiction in defiance of a plain mandate of the Constitution itself, and in obedience only to an unnecessary implication drawn from an act of Congress, which (in so far as it purports to grant what had been already granted by the Constitution, appellate jurisdiction in any case) is gratuitous, extra-constitutional, inoperative, and, legally speaking, an entire nullity; and which, therefore, gives no color of authority for such an implication.

#### MR. HEARD'S ARGUMENT.

Mr. Heard followed upon the errors assigned, and commenced upon the thirteenth error, as follows: "13. That it does not appear that the verdict of said jury was rendered in open court, and in the presence of the prisoner."

He cited Archbold's Criminal Pleading (13th ed.), 146, and contended that it must appear on the record that the verdict was rendered in open court and in the presence of the prisoner, and that in this the record was insufficient.

He next took up the twelfth error assigned, namely, "12.

That said indictment does not appear to be signed by the foreman of the grand jury," which he contended was necessary, though no authority was found for this point at common law.

Eleventh error. "That the verdict is repugnant to the general averment and clause in the indictment giving the court jurisdiction."

The clause referred to is made up of the last four lines in the body of the indictment, namely, "And the jurors aforesaid, upon their oath aforesaid, do further present, that the District of Massachusetts is the district into which said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, Charles H. Stanley, otherwise called John W. Ballard, were first brought after committing the aforesaid 'offence.'"

This point was argued at length, and the leading case in England was cited in its support. *O'Connell v. The Queen*, 11 Clark & Fin. 155; also *Holloway v. The Queen*, 2 Denison's Crown Cases, 287. Mr. Heard contended that the letter "s" saved O'Connell, and that the principle applied in that case applies to the case at bar. He also contended that the word "offence" should have been in the plural, inasmuch as the several prisoners were indicted for several offences, as murder, manslaughter, etc.

The errors assigned from the seventh to the tenth, inclusive, were then considered, which are in substance, that it nowhere appears of what felony, if any, Plumer was "adjudged" guilty, or "deemed or adjudged guilty"; or for "what felony he suffered sentence of death"; or that he was sentenced to death for the particular murder of which he was found guilty by the jury. Wharton's Crim. Law (2d ed.), 151.

The second error assigned was then considered, which was that there was no sufficient averment that the person alleged to be injured was under the protection or within the jurisdiction of the United States.

Under the general assignment of other errors and informalities in the record, the counsel raised the point that the action of the court was improperly put in the past tense, while he contended

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that it should have been put in the present tense, that the action of the parties might be in the past or present; reading from Gabbett, Vol. II. p. 563, who also cited, in support of this point, *King v. Perin*, 2 Saund. 393, 6th ed. He also cited the case of *United States v. Bird*, 1 Spr. 299, in support of another error, that no averment of issue joined appeared upon the record, and read also from Archbold in support of the same objection.

Again, under the general assignment, that it did not appear of what jury a list was acknowledged to be received by the prisoners "more than two days before the day of the trial." The record of *United States v. Bird* was cited as being correct on this point. It was also stated this case was the first under the Crimes Act of 1790.

#### MR. BUTLER'S ARGUMENT.

Mr. Butler then addressed the court upon the general question whether a writ of error would lie in a criminal case to the Supreme Court. He said that if the errors assigned seemed mostly verbal and immaterial, there was no situation in which a man might better be excused for criticising such errors than one where he was contending for his life. He knew of nothing better calculated to fit any person for a full and fair examination of this case, than reading the opinion of Lord Mansfield in the case of *Wilkes*. In the sparsity of writs of error in the Circuit Court of the United States, a degree of inaccuracy had crept into their records.

He said he referred to the originals of our laws on crimes which were to be found in the common law of England, and remarked that our laws had been modified by statutes and conformed to the institutions of our country.

He said that the laws of the United States recognized two kinds of murder: one was murder and piracy on the high seas; and the other was wilful murder, which might be committed in any place.

He then took up the first and second errors assigned, and contended that in the indictment and record there was no sufficient averment of the jurisdiction of this court over the case at bar,

and contended that a charge of piracy and murder "on the high seas" would fall under the jurisdiction of every nation or any which should first come at the offender.

But in an indictment of murder simply, the rule is different. It asserted that "it was on an American vessel." He contended that this would never be explicit enough until the time when our country shall comprise the whole of America.

There was also no averment that the vessel was under the protection of the United States, or that it was in the lawful business of the United States, nor that Archibald Mellen was a citizen of the United States; and that for all the record contained, he might have been a pirate, there being no averment that the injured person was under the protection of the United States.

He said that he was doing his whole duty in attempting to raise a reasonable doubt in the mind of the judge, and he contended that the prisoner should have the benefit of such a doubt now as much as when he was before the jury upon a question of fact.

In the third assignment there was nothing to show that the prisoner was allowed the privilege of challenging the jurors by whom he was tried; and he said that in a broad view this was not merely a technical point, but might be of great importance to those who shall come after us, if ever, hereafter, in stormy times, the country should be cursed with a Jeffreys on the bench. In Massachusetts, he said the right of challenge was almost taken away, which had resulted from the gradual encroachments of the courts, as well in this country as in England.

The fourth and thirteenth errors assigned were then considered, that there was no averment that the defendant was present at the time of impanelling the jury, during the trial, or at the return of the verdict. And in connection with this the counsel referred to the general error that the record was put in the past tense, citing copious authorities in support of this allegation of error. By the present tense the whole proceedings were recorded as they came up.

The fifth assignment was, "That in and by said record it nowhere appears that Plumer was permitted to be heard by the

said jury so impanelled, by himself or his counsel; and that in truth and in fact Plumer was not permitted to address the jury in his own proper person." He said that here there was a double assignment, an error of law and an error of fact; and he argued that an error of fact would lie in the Supreme Court.

The sixth error was, that said verdict of guilty was rendered upon all the counts of said indictment, while one or more of said counts are defective and insufficient in law to support any judgment. One good count, the counsel was willing to allow, was sufficient upon which to find a verdict, but that the particular count on which the defendant is found guilty must appear in the record.

He then criticised the record in the errors assigned from the seventh to the eleventh assignments inclusive, as not expressing what felony the said Plumer was found guilty of, insisting that the statute in this regard was *nomen collectivum*, and only meant to express that the defendant should be found guilty of the felony with which the indictment charged him; and he believed that in this opinion he would be supported by every good lawyer, that "the felony of which he was convicted" should be entered on the record.

Mr. Butler continued his argument by dwelling upon the question of the power of the judge to stay the execution, believing that if it was in his power, it would be the pleasure of the judge. He argued this point briefly, when the judge said that he had no doubt of the power of the court.

In concluding this part of his argument, he said that he had labored to raise a reasonable doubt in the mind of the court, that in all this mass of errors there were some which should be corrected; and for himself and for his client he did not care whether his Honor tried the case again himself with his associate justice, or whether it were taken to the Supreme Court.

He then passed on to speak of the possibilities of a "writ of error" under the Constitution of the United States, reading from the Constitution the appellate jurisdiction belonging to the Supreme Court, and citing various cases under it, and said that Chief Justice Marshall first suggested a doubt on the subject in

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1805, the same justice having passed over the same point *sub silentio* in 1802. This was the case of *United States v. Simms*, 1 Cran. 252, and the opinion, the counsel believed, was given with a determination that the President should not appoint any judges to take a certain prisoner out of the hands of the court. He criticised this opinion fully, and declared that the great chief justice had confounded the regulations made for one purpose and the exceptions made for another. In continuing his remarks he cited 1 Cran. 212; and 6 Cran. 307; 3 Cran. 159; 2 Cur. 412; 3 Pet. 370, in which the point was ruled by *obiter* decisions merely.

In closing, Mr. Butler made an earnest appeal for the rights of the subject when prosecuted by the government. He declared that the criminal jurisdiction of the Supreme Court will have to be enlarged, so that the peace of the country and the rights of the citizen might be secured against the arbitrary decisions of political judges, by having such cases reviewed by the high court, consisting of learned judges from all parts of the country, who would not be swayed by local prejudice.

The argument was then concluded with an expressed desire that his Honor would seal a bill of exceptions to the Supreme Court, to get the minds of that court upon the case.

CLIFFORD, J. Plumer, the petitioner, with three others, to wit, William H. Carther, William Herbert, and Charles H. Stanley, on the 30th of October, 1858, was indicted for the crime of murder committed on board the ship *Junior* on the high seas. He was charged as principal, and the other three were joined in the same indictment as principals in the second degree. They were all seamen on board the ship *Junior*, an American vessel employed in a whaling voyage, and the charge was that the prisoners, on the 26th of December, 1857, on the high seas, when the ship was in the Indian Ocean, out of the jurisdiction of any particular State, feloniously, wilfully, and of their malice aforethought, murdered Archibald Mellen, the master of the vessel. Having been first brought into the District of Massachusetts after committing the offence, they were indicted in the Circuit Court for that district, under the fourth section of the act of the 3d of March,

1825, and the petitioner was found guilty, by the verdict of the jury, of the crime as charged in the indictment, but the other three were found guilty of manslaughter, and not guilty of the principal charge. Subsequent to the verdict, and before sentence, the petitioner filed a motion for new trial, alleging errors in the rulings of the court, and also a motion in arrest of judgment, alleging defects in the indictment, but both motions were afterwards withdrawn by the advice of his counsel, and at his own personal request, made in open court. Pending those motions, further proceedings in the case were suspended, but when they were waived and withdrawn, the district attorney moved for sentence, and the prisoner was set at the bar for that purpose. Inquiry was then made of the prisoner by the clerk, pursuant to the order of the court, whether he had anything to say why sentence of death should not be pronounced against him; and the court having heard and attentively considered his reply, and perceiving nothing therein to create any doubt as to the legality of his conviction, proceeded to pronounce against him the sentence of death set forth in the record as required by law. Throughout the trial both judges of the Circuit Court were present, and every ruling and proceeding in the trial were fully approved by both judges. Application is now made to the presiding justice at chambers for the allowance of a writ of error from the Supreme Court to the Circuit Court to remove the cause into the Supreme Court for the correction of certain alleged errors in the record, process, and proceedings in the trial, as specified in the paper accompanying the petition, called the assignment of errors. Some of the alleged errors are substantially the same as those which were set forth in the motion for new trial, and others are substantially the same as those set forth in the motion previously filed in arrest of judgment, both of which were waived and withdrawn before sentence. As assigned in the paper filed with the petition, the errors are fifteen in number; and the several assignments have all been very fully and ably argued by counsel appearing in behalf of the petitioner; but I do not think it proper to decide the questions presented in the assignment of errors, nor any one of them, as I am of the



opinion that a writ of error will not lie from the Supreme Court to the Circuit Court in a criminal case, and consequently, that the judges of the Circuit, whether sitting in court or at chambers, have no jurisdiction to grant the prayer of the petition. The power to allow a writ of error, after final judgment in a civil action, is impliedly vested in a judge of the Circuit Court by the twenty-second section of the Judiciary Act, subject to the conditions therein specified, and no doubt is entertained that the writ in all cases falling within that section, may be allowed by either of the judges of the Circuit Court, as well when the hearing is at chambers as when the application is presented in open court. An argument upon that point is unnecessary; but the prayer of the petition is denied expressly upon the grounds that the Circuit Court cannot grant a bill of exceptions in a criminal case, and that a writ of error from the Supreme Court to the Circuit Court will not lie to remove the judgment of the Circuit Court in such a case into the Supreme Court for re-examination. Bills of exceptions in the Federal courts are required to be drawn as at common law, under the statute of Westminster 2 (13 Edw. I. c. 31), passed in the year 1285, and of course they must be taken during the trial and before the jury retire from the bar, and must be seasonably sealed by the judge as therein required. 1 Pick. Stat. 206; 2 Tidd. Prac. 862; 1 Arch. Prac. (11th ed.) 443; 2 Bac. Abr. 113.

Exceptions under that statute were never allowed in criminal cases in the courts of the parent country; and from the moment it was adopted as the rule of decision in the Federal courts to the present time, its application, without any exception, has uniformly been confined to civil actions. 1 Chitt. Cr. L. 622; 1 Lev. 68; 1 Sid. 65; *Rex v. Stratten*, 21 How. St. Tr. 1187; *United States v. Gibert*, 2 Sumn. 22; *The People v. Holbrook*, 13 John. 90; *Ex parte Barker*, 7 Cow. 143; *People v. Vermilyea*, 7 Cow. 108; 1 Phil. Ev. 997.

Authority to grant writs of error to the Circuit Courts to remove criminal cases into the Supreme Court for re-examination in matters of law, might undoubtedly be vested in the justices of the Supreme Court, but the insuperable difficulty in the way of



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exercising any such power at the present time is, that Congress has not conferred any such jurisdiction. Such judicial power as belongs to the United States was created by the Constitution, and the provision is that it shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish ; and the second section of the same article provides that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of Congress, and treaties made or which shall be made under their authority, and to all the other cases and controversies therein enumerated, subject of course to the rule of construction and the limitation in the eleventh article of the Amendments. Obviously, the words "all cases in law" are comprehensive enough to include criminal cases as well as civil actions, but the difficulty in assuming jurisdiction without an act of Congress, arises from the provision contained in a subsequent clause of the same section, which will presently be noticed. Original cognizance of all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, is confided to the Supreme Court without any qualification ; but the provision in respect to the appellate jurisdiction of that court is that "in all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." No dispute, it would seem, can ever arise as to the original jurisdiction of the Supreme Court, as it is conferred in unambiguous terms and without any qualification, and the cases to which it extends are specifically enumerated ; but the language employed in describing the appellate jurisdiction of that tribunal, is not quite so cautiously guarded, and it is conferred subject to such exceptions as Congress may make, and must be exercised under such regulations as Congress may prescribe. Unexplained, it would extend in all cases to the facts of the case as well as to the law ; but the next clause of the same section provides that the trial of all crimes, except in cases of impeachment, shall be by jury ; and the seventh amendment ordains that no fact tried by a jury shall be otherwise re-examined than according to the rules of the

common law. *Parsons v. Bedford et al.* 8 Pet. 447, 448. Exceptions to the appellate jurisdiction of the Supreme Court, as conferred in the second section of the third article of the Constitution, it is conceded, may be made by Congress, but the argument is that none have been made; and the petitioner insists that until exceptions are made by Congress, the appellate jurisdiction of the Supreme Court extends to all cases whatsoever, civil or criminal, arising under the Constitution and laws of the United States, except such as are included in the original jurisdiction of that court. Ingeniously put and well argued as the proposition has been, the court might hesitate to reject it, if the question was *res integra*; but it is not, as is very properly conceded by the petitioner. Even viewed as a theory of new impression, the argument in support of it is not satisfactory, as it assumes that the jurisdiction exists unless it be shown that it is excluded by some express exception in an act of Congress. Separated from the closing sentence of the clause in question, the construction suggested might be correct; but the whole clause must be read as it stands, and when so read it is clear that the appellate jurisdiction of the Supreme Court, if Congress legislates upon the subject, must be exercised under such regulations as Congress shall prescribe, as it is that the appellate jurisdiction is conferred with such exceptions as Congress shall make. Undoubtedly, the powers of the Supreme Court, both original and appellate, are given by the Constitution, and not by the Judiciary Act, as is sometimes supposed; but the appellate jurisdiction of that tribunal is limited and regulated by the Judiciary Act and other kindred acts upon the same subject. Had Congress organized the Supreme Court without any regulations as to the manner in which the court should exercise its powers, the appellate jurisdiction of the court, as conferred in the Constitution, would have been as untrammelled as its original jurisdiction has been throughout our judicial history. Difficulties and embarrassments for want of such regulations would undoubtedly have been encountered at every step; but the better opinion is, that Congress cannot defeat the appellate jurisdiction of the Supreme Court by omitting to enact regulations for its exercise, as authorized by

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the Constitution. Congress, it is true, has not declared in express terms that the appellate jurisdiction of the Supreme Court shall not extend to criminal cases, nor to civil actions or suits in equity where the matter in dispute, exclusive of costs, does not exceed the sum or value of \$2,000; but Congress has described affirmatively the appellate jurisdiction of that court, and that affirmative description has always been held "to imply a negative on the exercise of such appellate power as is not comprehended within it." *United States v. More*, 3 Cran. 170; *Durousseau v. United States*, 6 Cran. 314.

Original cognizance, concurrent with the courts of the several States, is conferred upon the Circuit Courts, by the eleventh section of the Judiciary Act, of all suits of a civil nature, at common law, or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of \$500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State. 1 Stat. at Large, 78.

Unquestioned power is also conferred upon the Supreme Court by the twenty-second section of the same act, to re-examine upon writ of error final judgments in civil actions rendered in a Circuit Court, where the matter in dispute, exclusive of costs, exceeds the sum or value of \$2,000; and detailed regulations are enacted, prescribing the steps to be taken in suing out the writ and defining the manner of exercising the power, as contained in the same and subsequent sections of that act; but they all have respect to the removal of civil actions at common law, suits in equity, or causes of admiralty and maritime jurisdiction. Criminal cases are not even mentioned in those regulations, nor is any one of them of a character to be applied in the removal of an indictment or judgment in a criminal case, from the Circuit Court into the Supreme Court for re-examination. Viewed in the light of those regulations, as the case should be, the implication is very strong that Congress at that time did not intend that the appellate jurisdiction of the Supreme Court, as therein described, should extend to any cases other than those to which those regulations applied; and the presumption that criminal

cases were intentionally excepted therefrom is much strengthened by the fact that the original jurisdiction of the Circuit Courts over crimes and offences cognizable under the authority of the United States, is conferred by the same section in that act, which gives those courts original cognizance, concurrent with the courts of the several States, of suits of a civil nature at common law and in equity. 1 Stat. at Large, 78.

Ample provision was made in that act for the re-examination of final judgments and decrees in civil actions and suits in equity, and in causes of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum or value of \$2,000; but no provision is made for the re-examination of criminal cases, or of cases of a civil nature, of any kind whatsoever, where the matter in dispute is less than the sum or value prescribed in the twenty-second section of that act.

Alterations have since been made in the regulations upon that subject, such as substituting appeals in the place of writs of error for the removal into the Supreme Court of decrees in equity, and decrees in admiralty cases, and of prize or no prize, and for writs of error in revenue cases, irrespective of the amount in dispute, but none of the new regulations afford any support to the present application, or give any countenance whatever to the theory that a writ of error under any circumstances will lie in a criminal case to a Circuit Court. Repeated decisions of the Supreme Court have established the opposite rule, and those decisions have been too long acquiesced in as sound expositions of the Judiciary Act to be changed without an act of Congress. *Ex parte Kearney*, 7 Wheat. 42; *Ex parte Watkins*, 3 Pet. 201; *Forsyth v. United States*, 9 How. 571; *In re S. C.*, 14 How. 120; *Ex parte Watkins*, 7 Pet. 568; *Ex parte Gordon*, 1 Black. 505; Bish. on Cr. Proceed. § 940.

Efforts have been made in Congress at different periods to extend the appellate jurisdiction of the Supreme Court so as to include criminal cases, but the measure has never received much support, as it was foreseen that it would increase the business of that court beyond what the judges could accomplish, and would

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necessarily lead to such delays as would tend to defeat the great purpose intended to be accomplished in the administration of criminal justice.

Petition denied.

*Mr. Butler.* — I now make application for a writ of error *coram vobis*, returnable before the Circuit Court.

Judge Clifford intimated that he was of the impression that in the practice of the Circuit Court, the writ *coram vobis* had been substantially superseded by the practice of a petition (with an assignment of errors annexed) to set aside the proceedings for informalities and defects in the record. It was then arranged that that course should be adopted, and the court agreed to hear the application, with Judge Sprague, at Boston, on Tuesday morning next, at the Circuit Court room.



HEARING AT BOSTON, JULY 5 AND 6, 1859. BEFORE CLIFFORD  
AND SPRAGUE, JJ.

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1. A writ of error *coram vobis* does not lie in the Circuit Court in a criminal case, either from its own judgment or the judgment of the District Court.
2. Being without any common-law authority to try or punish offenders, except for contempt, they cannot exercise any power in a criminal case not derived expressly or impliedly from an act of Congress.
3. No authority has been given in the acts of Congress to the Circuit Court to re-examine, by writ of error or in any other manner, the rulings or judgments of the District Court in criminal cases. No such authority is given by the fourteenth section of the Judiciary Act.
4. By that section Congress only intended to vest the power to issue such other writs in cases where jurisdiction already existed, and not where the jurisdiction was to be acquired by means of the writ to be issued.
5. Difference between the writ of error *coram vobis* and the writ of error *coram vobis* explained and illustrated.
6. If the alleged error be in the judgment itself, and not in the process, a writ of error does not lie in the same court to correct it.
7. The indictment averred that the alleged crime was committed in and on board of a certain ship called the Junior, then and there owned by and belonging to the four persons therein named, all of whom are alleged to be citizens of the United States, and also contained the further allegation that all the criminal acts of the prisoner were committed

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within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of the court, and out of the jurisdiction of any particular State of the United States. *Held*, that there is a sufficient averment that the Circuit Court had jurisdiction, and that the injured party was within and under the protection of the United States, and in the peace thereof.

8. In this record it sufficiently appears that the prisoner was permitted his right of challenge.
9. By this record it sufficiently appears that the prisoner was present at the impanelling of jury, and when the verdict was rendered by the jury.
10. All the counts in this indictment held good; but granting that some are bad and some good, the verdict should stand.
11. The use of the past tense in this record is no valid objection to the record.
12. It sufficiently appears in and by the record that issue was joined.
13. When the docket entries show that the list of witnesses was furnished the prisoner in a capital case, and the record shows that prisoner acknowledged in open court, before the jury was impanelled, that he did receive it two entire days prior to that time, it sufficiently appears that such list was furnished as required.
14. It sufficiently appears in and by this record of what felony the prisoner was convicted and for what he was sentenced.
15. The designation "foreman," appended to the name of the person signing the indictment as such, is sufficient, as the designation "foreman" refers to the introductory clause of the indictment, and to the record, as verifying the legal inference that "foreman" means foreman of the grand jury.

THE prisoner, with three others, was indicted in the Circuit Court for the District of Massachusetts, for murder on the high seas. Plumer was tried and convicted.

A motion for a new trial and in arrest were filed, but they were afterwards waived, and Plumer was sentenced to be executed.

A motion was now made for allowance of a writ of error *coram nobis*. *Benjamin F. Butler*, *George W. Searle*, and *F. F. Heard* appeared as counsel for the Plaintiff in Error; *C. L. Woodbury*, District Attorney, and *M. Andros*, Assistant District Attorney, appeared for the Government.

The indictment, record, and docket entries were thus: —

## THE INDICTMENT.

## UNITED STATES OF AMERICA.

*Circuit Court of the United States of America, for the District of Massachusetts.*

At a Circuit Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said district, on the 15th of October, 1858.

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United States v. Plumer.

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The jurors of the United States of America, within and for the district aforesaid, upon their oath, present,

That Cyrus Plumer, mariner, otherwise called Cyrus W. Plumer, late of New Bedford, in said district, William H. Carther, mariner, otherwise called Richard Carther, late of New Bedford, in said district, William Herbert, late of New Bedford, in said district, mariner, and Charles H. Stanley, mariner, otherwise called John W. Ballard, late of New Bedford, in said district, on the 26th of December, 1857, with force and arms on the high seas and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, in and on board of a certain vessel, the same then and there being a ship called Junior, then and there owned by and belonging to David R. Greene, Robert B. Greene, Dennis Wood, and Willard Nye, all citizens of the said United States, in and upon one Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, feloniously, wilfully, and of their malice aforethought, did make an assault, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, with a certain gun, called a whaling gun, then and there charged with gunpowder and three leaden bullets, which said gun he the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in both his hands then and there had, and held at and against the body of him the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, then and there feloniously, wilfully, and of his malice aforethought, did shoot off and discharge, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there with the three leaden bullets aforesaid, out of the gun aforesaid, then and there



by force of the gunpowder aforesaid, by him the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there shot off, discharged, and sent forth as aforesaid, him the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, in and upon the left side of the body of him the said Archibald Mellen, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, then and there giving to him the said Archibald Mellen, then and there with the three leaden bullets aforesaid, so as aforesaid by him the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there shot off, discharged, and sent forth out of the gun aforesaid, by force of the gunpowder aforesaid, in, upon, and against the left side of the body of him the said Archibald Mellen, and then and there penetrating into and through the body of him the said Archibald Mellen, one mortal wound, of which said mortal wound, the said Archibald Mellen, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, then and there on the said twenty-sixth day of December, in the year aforesaid, instantly died. And that the said William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, then and there on the said twenty-sixth day of December, in the year aforesaid, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, feloniously, wilfully, and of their malice aforethought, were present, and then and there feloniously, wilfully, and of their malice aforethought, were aiding, abetting, comforting, assisting, and maintaining the said Cyrus Plumer, otherwise called Cyrus W. Plumer, the felony and mur-

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der aforesaid, in the manner and form aforesaid, then and there to do, commit, and perpetrate.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, feloniously, wilfully, and of their malice aforethought, him the said Archibald Mellen, did then and there, in the manner and form aforesaid, kill and murder. Against the peace and dignity of the said United States, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present that Cyrus Plumer, mariner, otherwise called Cyrus W. Plumer, late of New Bedford, in said district, William H. Carther, mariner, otherwise called Richard Carther, late of New Bedford, in said district, William Herbert, late of New Bedford, in said district, mariner, and Charles H. Stanley, mariner, otherwise called John W. Ballard, late of New Bedford, in said district, on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and fifty-seven, with force and arms, on the high seas, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, in and on board of a certain vessel, the same then and there being a ship called Junior, then and there owned by and belonging to David R. Greene, Robert B. Greene, Dennis Wood, and Willard Nye, all citizens of the said United States, in and upon one Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, feloniously, wilfully, and of their malice aforethought, did make an assault, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there, with a certain instrument of wood and iron, called a hatchet, which he, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and

there, in his right hand, had and held, the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, in and upon the back of the neck of him the said Archibald Mellen, then and there feloniously, wilfully, and of his malice aforethought did strike, thrust, and penetrate, then and there giving to the said Archibald Mellen, in and upon the back of the neck of him the said Archibald Mellen, then and there with the hatchet aforesaid, by such striking with the hatchet aforesaid, in the manner aforesaid, one mortal wound, of the length of three inches, and of the depth of two inches, of which said mortal wound the said Archibald Mellen, on the said twenty-sixth day of December, in the year aforesaid, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, instantly died. And that the said William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, then and there, on the said twenty-sixth day of December, in the year aforesaid, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, feloniously, wilfully, and of their malice aforethought were present, and then and there feloniously, wilfully, and of their malice aforethought were aiding, abetting, comforting, assisting, and maintaining the said Cyrus Plumer, otherwise called Cyrus W. Plumer, the felony and murder aforesaid, in the manner and form aforesaid, to do, commit, and perpetrate.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Bal-

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lard, feloniously, wilfully, and of their malice aforethought, him the said Archibald Mellen, then and there, in the manner and form aforesaid, did kill and murder. Against the peace and dignity of the said United States, and contrary to the form of the statute in such case made and provided. .

And the jurors aforesaid, upon their oath aforesaid, do further present that Cyrus Plumer, mariner, otherwise called Cyrus W. Plumer, late of New Bedford, in said district, William H. Carther, mariner, otherwise called Richard Carther, late of New Bedford, in said district, William Herbert, late of New Bedford, in said district, mariner, and Charles H. Stanley, mariner, otherwise called John W. Ballard, late of New Bedford, in said district, on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and fifty-seven, with force and arms, on the high seas, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, in and on board of a certain vessel, the same then and there being a ship called Junior, then and there owned by and belonging to David R. Greene, Robert B. Greene, Dennis Wood, and Willard Nye, all citizens of the said United States, in and upon one Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, feloniously, wilfully, and of their malice aforethought did make an assault, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there, with a certain instrument of wood and iron, called a hatchet, which he, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there in his right hand had and held, the said Archibald Mellen then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, in and upon the neck, back, and shoulders

of him, the said Archibald Mellen, then and there, feloniously, wilfully, and of his malice aforethought did strike, thrust, and penetrate, then and there giving to the said Archibald Mellen, in and upon the neck, back, and shoulders of him, the said Archibald Mellen, then and there with the hatchet aforesaid, by such striking with the hatchet aforesaid, in the manner aforesaid, several mortal wounds, to wit, one mortal wound in and upon the back of the neck of him, the said Archibald Mellen, of the length of three inches, and of the depth of two inches, and one mortal wound in and upon the back of him, the said Archibald Mellen of the length of three inches, and of the depth of two inches, and two mortal wounds in and upon the left shoulder of him, the said Archibald Mellen, each of said two last-mentioned mortal wounds being of the length of three inches, and of the depth of two inches, of which said several mentioned and described mortal wounds, the said Archibald Mellen, on the said twenty-sixth day of December, in the year aforesaid, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, instantly died. And that the said William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, then and there, on the said twenty-sixth day of December, in the year aforesaid, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, feloniously, wilfully, and of their malice aforethought were present, and then and there feloniously, wilfully, and of their malice aforethought were aiding, abetting, comforting, assisting, and maintaining the said Cyrus Plumer, otherwise called Cyrus W. Plumer, the felony and murder aforesaid, in the manner and form aforesaid, to do, commit, and perpetrate.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Cyrus Plumer, otherwise called Cyrus W. Plumer,

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William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, feloniously, wilfully, and of their malice aforethought, him, the said Archibald Mellen, then and there in the manner and form aforesaid, did kill and murder. Against the peace and dignity of the said United States, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present that Cyrus Plumer, mariner, otherwise called Cyrus W. Plumer, late of New Bedford, in said district, William H. Carther, mariner, otherwise called Richard Carther, late of New Bedford, in said district, William Herbert, late of New Bedford, in said district, mariner, and Charles H. Stanley, mariner, otherwise called John W. Ballard, late of New Bedford, in said district, on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and fifty-seven, with force and arms on the high seas, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, in and on board of a certain vessel, the same then and there being a ship called Junior, then and there owned by and belonging to David R. Greene, Robert B. Greene, Dennis Wood, and Willard Nye, all citizens of the said United States, in and upon one Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, feloniously, wilfully, and of their malice aforethought, did make an assault, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there a certain gun, called a whaling gun, then and there charged with gunpowder and three leaden bullets, which said gun the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in both his hands, then and there had and held at and against the body of him, the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and

maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, then and there feloniously, wilfully, and of his malice aforethought did shoot off and discharge, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there with the three leaden bullets aforesaid, out of the gun aforesaid, then and there by force of the gunpowder aforesaid, by him the said Cyrus Plumer, otherwise called Cyrus W. Plumer, so as aforesaid shot off, discharged, and sent forth, him, the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, in and upon the left side of the body of him, the said Archibald Mellen, then and there feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound; and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, then and there with a certain instrument of wood and iron, called a hatchet, which he, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there in his right hand had and held, the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, in and upon the neck, breast, shoulders, body, and back of him, the said Archibald Mellen, feloniously, wilfully, and of his malice aforethought did strike, then and there giving to him, the said Archibald Mellen, as well by the three leaden bullets aforesaid, so as aforesaid, by him, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, shot off, discharged, and sent forth out of the gun aforesaid, by force of the gunpowder aforesaid, at

and against the body of him, the said Archibald Mellen, in the manner and form aforesaid, as by the instrument of wood and iron called a hatchet, as aforesaid, several mortal wounds, to wit, one mortal wound in and upon the left side of the body of him, the said Archibald Mellen, and then and there penetrating into and through the body of him, the said Archibald Mellen; and one mortal wound in and upon the back of the neck of him, the said Archibald Mellen, of the length of three inches, and of the depth of two inches; and one mortal wound in and upon the back of him, the said Archibald Mellen, of the length of three inches, and of the depth of two inches; and two mortal wounds in and upon the left shoulder of him, the said Archibald Mellen, each of said two last-mentioned mortal wounds being of the length of three inches, and of the depth of two inches, of which said several mentioned and described mortal wounds, he, the said Archibald Mellen, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, on the said twenty-sixth day of December, in the year aforesaid, instantly died. And that the said William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, then and there, on the said twenty-sixth day of December, in the year aforesaid, in and on board the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, feloniously, wilfully, and of their malice aforethought were present, and then and there feloniously, wilfully, and of their malice aforethought were aiding, abetting, comforting, assisting, and maintaining the said Cyrus Plumer, otherwise called Cyrus W. Plumer, the felony and murder aforesaid, in the manner and form aforesaid, to do, commit, and perpetrate. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther,



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William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, feloniously, wilfully, and of their malice aforethought, the said Archibald Mellen, did then and there, in the manner and form aforesaid, kill and murder. Against the peace and dignity of the said United States, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present, that Cyrus Plumer, mariner, otherwise called Cyrus W. Plumer, late of New Bedford, in said district, William H. Carther, mariner, otherwise called Richard Carther, late of New Bedford, in said district, William Herbert, late of New Bedford, in said district, mariner, and Charles H. Stanley, mariner, otherwise called John W. Ballard, late of New Bedford, in said district, on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and fifty-seven, with force and arms, on the high seas, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, in and on board of a certain American vessel, the same then and there being a ship called Junior, then and there belonging to a citizen or citizens of the said United States (whose name or names is and are to the jurors aforesaid as yet unknown), in and upon one Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, feloniously, wilfully, and of their malice aforethought, did make an assault, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there a certain gun called a whaling gun, then and there charged with gunpowder and three leaden bullets, which said gun the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in both his hands, then and there had and held at and against the body of him, the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and



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within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, then and there feloniously, wilfully, and of his malice aforethought, did shoot off and discharge, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there, with the three leaden bullets aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by him, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, so as aforesaid, shot off, discharged, and sent forth, him, the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, in and upon the left side of the body of him, the said Archibald Mellen, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, then and there, with a certain instrument of wood and iron, called a hatchet, which he, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there in his right hand, had and held, the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, in and upon the neck, breast, shoulders, body, and back of him, the said Archibald Mellen, feloniously, wilfully, and of his malice aforethought, did strike, then and there giving to him, the said Archibald Mellen, as well by the three leaden bullets aforesaid, so as aforesaid, by him, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, shot off, discharged, and sent forth, out of the gun aforesaid, by force of the gunpowder aforesaid, at and against the body of him, the said Archibald Mellen, in the

manner and form aforesaid, as by the instrument of wood and iron, called a hatchet, as aforesaid, several mortal wounds, to wit, one mortal wound in and upon the left side of the body of him, the said Archibald Mellen, and then and there penetrating into and through the body of him, the said Archibald Mellen; and one mortal wound in and upon the back of the neck of him, the said Archibald Mellen, of the length of three inches, and of the depth of two inches; and one mortal wound in and upon the back of him, the said Archibald Mellen, of the length of three inches, and of the depth of two inches; and two mortal wounds in and upon the left shoulder of him, the said Archibald Mellen; each of said last-mentioned mortal wounds being of the length of three inches, and of the depth of two inches, of which said several mentioned and described mortal wounds, he, the said Archibald Mellen, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, on the said twenty-sixth day of December, in the year aforesaid, instantly died. And that the said William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, then and there, on the said twenty-sixth day of December, in the year aforesaid, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States, feloniously, wilfully, and of their malice aforethought, were present, and then and there feloniously, wilfully, and of their malice aforethought were aiding, abetting, comforting, assisting, and maintaining the said Cyrus Plumer, otherwise called Cyrus W. Plumer, the felony and murder aforesaid, in the manner and form aforesaid, to do, commit, and perpetrate. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John

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W. Ballard, feloniously, wilfully, and of their malice aforethought, the said Archibald Mellen, did, then and there, in the manner and form aforesaid, kill and murder. Against the peace and dignity of the said United States, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present that the District of Massachusetts is the district into which the said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, Charles H. Stanley, otherwise called John W. Ballard, were first brought after committing the aforesaid offence.

A true bill.

B. F. COPELAND, *Foreman.*

CHARLES LEVI WOODBURY,

*United States Attorney for the District of Massachusetts.*

#### THE RECORD.

At this present October term of this court, A. D. eighteen hundred and fifty-eight, said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, were severally set to the bar and had this indictment read to them; and thereupon they severally said that thereof they were not guilty; and thereof for trial put themselves upon God and their country; and Benjamin F. Butler and Charles P. Chandler were assigned by the court as counsel for said Plumer; F. F. Heard and F. W. Pelton were assigned as counsel for said Carther; Thornton K. Lothrop and J. Q. Adams were assigned as counsel for said Herbert; and J. Hardy Prince and Samuel M. Quincy were assigned as counsel for Charles H. Stanley, otherwise called John W. Ballard; and said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, severally acknowledged that they had severally received a copy of the indictment, and a list of the jurors, agreeably to law, and more than two days before the day of their trial.

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A jury was thereupon impanelled and sworn to try the issue, namely, John B. Chisholm, foreman, and fellows, namely, Willard Bacon, Daniel C. Bates, Lemuel Grant, Charles Humphrey, Asher Joslin, Charles B. W. Lane, Benjamin Norris, Hiel J. Nelson, William Parker, William Tinker, and Amasa Whitney, of said district.

And the said jury afterwards returned their verdict that said Cyrus Plumer, otherwise called Cyrus W. Plumer, is guilty of murder as alleged in said indictment; William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, are severally guilty of manslaughter. And thereupon said Cyrus Plumer, otherwise called Cyrus W. Plumer, by his counsel, moves the court for a new trial as follows: —

[Here follows motions for new trial, and in arrest.]

Time was allowed by the court for preparation of counsel therein, and the said motions were set down for hearing; and afterwards, at the same term, the counsel of said Plumer moves the court for leave to withdraw the said motions for new trial and in arrest of judgment; and said Cyrus Plumer, otherwise called Cyrus W. Plumer, having been brought into court, and being inquired of personally, asks that such leave may be granted and that the said motions be withdrawn. Wherefore the court doth grant him leave to withdraw the said motions, and the same are accordingly waived and withdrawn by said Plumer; said Plumer is then asked if he had anything to say why judgment of death should not now be pronounced against him; and having replied thereto fully, and no good cause appearing to the contrary, and all matters in the case having been fully heard and understood by the court, it is considered by the court that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, be deemed guilty of felony, and that he, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, be taken back to the place from whence he came, and there remain in close confinement until Friday, the twenty-fourth day of June next, and on that day, between the hours of eleven o'clock in the forenoon and one o'clock in the afternoon, he, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, be taken thence to

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the place of execution, and that he be there hanged by the neck until he be dead.

Among other entries of the clerk's docket were the following, namely : —

No. 228. Oct. term, 1858. Oct. 30th. Indictment presented by the grand jury, Benjm. F. Copeland, foreman. Nov. 1st. Copy of ind. given to each of the four prisoners ; also list of petit jurors. Nov. 3rd. The court inquiring, all acknowledged that they had rec'd a copy of the indictment and jury list, and did not object to their arraignment. Dec. 2nd. Motion for a new trial filed, and motion in arrest of judgment, by Plumer. March 30th. The counsel for Plumer withdraws and waives his motion for new trial and in arrest of judgment. Plumer being brought into court asks leave to do so, and leave is granted by the court.

#### THE PETITION.

UNITED STATES OF AMERICA.

*Circuit Court of the United States of America, for the District of Massachusetts.*

To the Honorable the Justices of the Circuit Court of the United States of America, sitting within and for the first judicial circuit, in the District of Massachusetts.

Cyrus W. Plumer, now imprisoned in the district aforesaid, under sentence of death, on a judgment, warrant, process, and proceeding of the said Circuit Court of the United States of America, for the District of Massachusetts, says that there is manifest error in the process, proceedings, premises, and judgment, and feeling aggrieved thereby assigns as errors in said record, process, proceeding, and judgment the errors named and set forth in the paper hereto annexed, marked "assignment of errors."

And said Plumer, by reason of the errors aforesaid, and other errors in the proceedings and record aforesaid, prays that the record and judgment be set aside, reversed, stayed, respited, re-

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prieved, annulled, and held for naught, and that he be discharged thereof, and be suffered to go without day.

CYRUS W. PLUMER.

BOSTON, July 2, 1859.

B. F. BUTLER,  
F. F. HEARD,  
GEO. W. SEARLE, } *of Counsel.*

UNITED STATES OF AMERICA.

*District of Massachusetts, to wit : —*

BOSTON, 5th day of July, 1859.

Then personally appeared Cyrus Plumer, otherwise called Cyrus W. Plumer, and made solemn oath that all the errors in fact, named and set forth in the "assignment of errors," hereto annexed, are true, and every statement of fact in said assignment is true in substance and effect.

Before me,

G. D. GUILD,  
*United States Commissioner.*

ASSIGNMENT OF ERRORS.

UNITED STATES OF AMERICA.

*Circuit Court of the United States of America for the District of Massachusetts.*

Cyrus Plumer, otherwise called Cyrus W. Plumer, plaintiff in error, *v.* The United States of America, defendant in error.

And now, to wit, on the 2d day of July, A. D. 1859, cometh the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in his proper person, who is now imprisoned in the District of Massachusetts, under sentence of death, on a judgment, warrant, process, and proceeding of the said Circuit Court of the United States of America, for the District of Massachusetts, and immediately saith that in the record and process aforesaid, and also in the giving of the judgment aforesaid, against him the said Cyrus

Plumer, otherwise called Cyrus W. Plumer, there is manifest error in these, to wit: —

1. That in and by said indictment and record, there is no sufficient averment that the Circuit Court in which said indictment was returned and heard, had jurisdiction of the offence therein supposed to be charged.

2. That in and by said indictment and record, there is no sufficient averment that the person therein supposed to be injured was within or under the protection of or jurisdiction of the United States, or in the peace thereof.

3. That in and by said record it nowhere appears, or is set forth, that said Cyrus Plumer, otherwise called Cyrus W. Plumer, was informed of, or permitted to exercise, or did exercise his constitutional right of challenge of the jurors returned for his trial.

4. That in and by said record it nowhere appears, or is set forth, that said Plumer was present, either at the impanelling of the jury that tried him, or at the time said trial was had, or said verdict was rendered against him.

5. That in and by said record it nowhere appears that said Plumer was permitted to be heard by said jury so impanelled, either by himself or his counsel; and that in truth and in fact said Plumer was not permitted to address the jury in his own proper person.

6. That said verdict of guilty was rendered upon all the counts of said indictment, while one and more of said counts are defective and insufficient in law to support any judgment.

7. Because all the acts of the court are stated in the past tense.

8. Because it does not appear on said record that issue was joined between the prisoner and the United States.

9. It does not appear on the record, that the prisoner received a list of the proper jurors as by law required.

10. That it nowhere appears in and by said record of what (if any) felony said Plumer was adjudged guilty.

11. That it nowhere appears by said record of what "felony" the court "deemed" or adjudged the said Plumer "to be guilty."



12. That it nowhere appears by said record for what "felony" said Plumer was sentenced to suffer death.

13. That it nowhere appears in and by said record that Plumer received sentence of death for the particular murder of which the jury had found him guilty; but only for "felony" indefinitely, the particular felony not being described or in any manner designated.

14. That the verdict is repugnant to the general averment and clause in the indictment giving the court jurisdiction.

15. That said indictment does not appear to be signed by the foreman of the grand jury.

16. That it does not appear that the verdict of said jury was rendered in open court, and in the presence of the defendant.

17. That said record is in other respects informal, insufficient, erroneous, and the judgment thereon void and of none effect.

18. That by the said record it appears that judgment upon the indictment aforesaid was given against him, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in form aforesaid, whereas judgment by the said Circuit Court of the United States ought to have been given for the said Plumer, that he be thereof acquitted and go thereupon without day. Therefore in that there is manifest error.

And the said Cyrus Plumer, otherwise called Cyrus W. Plumer, prays that the said judgment aforesaid, for the errors being in the record and process aforesaid, may be reversed and annulled, and absolutely be had for nothing, and that he may be restored to the common law of the land, and to all things which he hath lost on the present occasion.

*B. F. Butler, Geo. W. Searle, and F. F. Heard* appeared for the petitioner.

*Charles Levi Woodbury*, District Attorney, and *Milton Andros*, Assistant Attorney, appeared for the United States.

Mr. Searle, for the prisoner, contended that the petition and accompanying papers bring into controversy the validity and sufficiency of this record as a chronicle of legal justice, so formal and accurate as to justify the enforcement of its last, its highest, and its most awful penalty. In the unequal contest of



the citizen with the government, it is his right, to the last breath in his body, to hold the line and the plummet to authority, and standing there, to insist that law shall be administered with all the forms and all the circumstances of legal justice. Between that power and the prisoner stand the rights of an accused man. He is now held by the strong arm of might; that arm must be upheld by the law, or its grasp is a nullity; that arm becomes the arbitrary oppressor of the prisoner, and not the representative instrument of justice, unless thus strengthened. The law assumes now to enforce its terrible penalty; it assumes to take human life, — what man cannot give.

The criminal law always, in its worst days, had its theoretical and even its real offsets of benefits and privileges, which were secured to the victim as an inheritance. These have always made up the forms of the criminal system. It is only by due process of law that a man is to be punished. All of this cause has now passed into the record; justice must stand on that record: and its grasp is powerless unless the forms of justice sustain it. Arbitrary power is no attribute of that criminal arm.

We have thought it proper to bring this record to the attention of the court. Now, as the gibbet looks down on a powerless man, we ask the representative ministers of human justice to pause, and with us review this criminal record, to see to it from beginning to end that it shows the forms of justice in all its parts, to the end that, if it be found valid, the law shall have its course and be glorified, — if it can be glorified by human blood; but, if it be found not so, to the end also that the great axe be arrested, and stayed at least until it can rise and fall with law to sustain it. I am desired merely and strictly to open the errors, others are to enforce them. They need no statement in detail.

What must the criminal record show, and does this record come up to the standard? That is in substance the whole question here at issue.

I. What now is this record of which we speak so much? The record may, perhaps with sufficient accuracy, be denominated the contemporaneous history of a judicial proceeding from beginning to end. That record imports absolute truth, and for it

there can be no intendment and no presumption. This record has gone into parchment. For to-day and all time that is the history of this cause. See *Sayles v. Briggs*, 4 Met. 421; Co. Litt. 260 a; Com. Dig. Record A. F.; *Fowler v. Byrd*, 1 Hemp. 214; 7 Com. Dig. title Record A.

II. What must and should that record of a capital felony contain? We claim that the only reliable answer to that question is contained in this proposition, namely:—

The record should contain an exact and formal statement in the present tense of every fact necessary to show demonstrably that judicial proceeding right and proper in all its stages,—showing clearly, without equivocation, doubt, or uncertainty, every fact necessary to justify the final act of sentence. It must be as exact as an indictment; if so exact it is sufficient, if not so exact and definite it is insufficient. The Circuit Court is one of limited and specific jurisdiction. This record must affirmatively show all the allegations necessary for that specific jurisdiction. *Dyson v. The State*, 26 Miss. (4 Cush.) 362.

III. This record is so faulty, defective, and insufficient as to impose upon the judicial function the imperative duty of setting it aside as a nullity, recalling the sentence, and retrying the prisoner.

1. The record must show the verdict of the jury in all cases of capital felony to have been delivered in open court in the presence of the prisoner. Co. Litt. 227 b; 3 Ins. 110; 2 Hawk. P. C. c. 47, § 2 (ed. 1824); 2 Hale's P. C. 300; Bacon's Ab. Verdict B.; 2 Gabbett's Cr. Law, 529 (Dublin ed. 1843); Archbold's Cr. Plead. 146 (London ed. 1856).

2. The fourth and sixth assignments are valid. The entry of the proceedings in the past tense is fatal on error. 2 Wm. Saunders, 393; 2 Gabbett's Cr. Law, 563. The moment the criminal record comes to the past tense in the chronicle of the acts going on at the trial, we lose on the record the personal presence of the prisoner, without which, in all stages of a criminal proceeding, it is an absolute nullity.

3. The seventh, eighth, ninth, and tenth assignments show that the record has no sufficient adjudication of guilt for the felony charged.

For all that appears on this record, Plumer may have been adjudged guilty of manslaughter; which sentence would not warrant the penalty of death. See form of entry of verdict on the record, in Arch. Cr. Plead. (1856), 147; also form of judgment, 152.

IV. The criminal record once entered up, and the term of the court at which the record was made up being ended, that record becomes the property of the defendant, and in it he has a vested right; to it he and his posterity have a right to appeal in all coming time as the permanent history of the judicial proceeding; it cannot be altered or amended.

“When once the judgment is solemnly entered on the record, no court can make any alteration in it; but if any material defect appear on the face of it, it can still be reversed by writ of error.” Arch. Crim. Plead. (Eng. ed.) 153; *Sayles v. Briggs*, 4 Met. 421.

“When proceedings have been entered upon the record, the common-law power of amendment ceases; for the judges at common law were prohibited from allowing alterations to be made in any record.” Britton Proem. 2, 2; note 1 Smith’s L. Cases (5th ed.), 589; see Buller’s N. P. 321; 3 Bl. Com. 407; 1 Bacon’s Ab. tit. Amendment, G. P. 167; 2 Sellon’s Prac. 458; *Short v. Kellogg et al.*, 10 Geo. 182; *Gilson v. Wilson*, 18 Ala. 63, 438; 2 Gude’s Prac. 137; 1 Com. Dig. Letter K, Amendment; Stat. 8 Hen. 612.

The Statutes of Jeofails never extended at common law to the king’s criminal process.

V. This petition with its assignment is the proper and established mode for reaching these questions in this court, and opens, like the general writ of error, “every substantial defect appearing on the face of the record”; including “irregularity in the verdict or judgment, or any manifest error on the face of the record.” Arch. Plead. 161; 4 Bl. Com. 391; 1 Chitty’s Crim. L. 747; *Pickett’s Heirs v. Legerwood*, 7 Pet. 144.

1. It has been already adjudicated, contrary to our hopes and against our confident expectations, that no writ of error lies from the Supreme to the Circuit Court in any criminal case.

2. It must follow then, that this is the highest court of error in a criminal case, and the remedy in error must be open before it. That is to say, it having been held that no writ of error lies from the Supreme to the Circuit Court in such a case as this, it must follow that the Circuit Court is the Supreme Court having jurisdiction: for before all supreme legal tribunals, from which there is no appeal, the writ of error *coram nobis* lies, in the very nature of things.

3. The final remedy in error somewhere, is a fundamental element in every judicial system in both civil and criminal cases. There can, in the very nature of things, be no complete judicial system without this final redress for judicial mistakes. Whether the given case is a proper one for the remedy is one thing, but that there is such remedy is inherent.

4. The locality of the redress must be in the highest court having jurisdiction of the subject-matter. If there is no remedy by error from the Supreme to the Circuit Court in criminal cases, the Circuit Court is the highest court of criminal jurisdiction in such cases, and the writ of error *coram nobis* must be maintainable.

5. It is no answer to say that in this case some of the points were made and then waived on motion for new trial, or that all of them were open in arrest. All this is true of most questions raised in error.

6. Nor is it any answer to say that the Circuit Court, being created by statute, has no common-law jurisdiction or process, as it confessedly has the common-law procedure in pleading, practice, and evidence; and these questions plainly relate to procedure.

To an inquiry upon these several points, and to a more elaborate enforcement of these suggestions, my associates ask attention; and, that their better words may be heard, I give way to them.

Mr. Heard followed upon the same side. Most of his propositions are stated in the preceding case, and he supported them by the authorities there referred to, and many others to the same effect.

Mr. Butler then followed in vindication of the petitioner's right

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to the writ, and in support of the validity of the various errors assigned. He commenced by announcing what he claimed to be a canon of criticism and judgment upon a record in a case of capital felony in the United States courts, namely, that the record must be a memorial of all the proceedings of the court, and that nothing can be taken by intendment.

The United States were sometimes said to have no common law ; but yet he claimed that they did have common law in definition, remedy, and procedure, though not in jurisdiction or power. It was not exactly the common law of England, but it might be well enough defined the common law of England as practised here. On this ground he supported and invoked the English decisions in cases of definition, remedy, and procedure. He then proceeded to discuss the validity of the errors assigned. If his canon was correct, he believed that the court must decide that this record was faulty to such a degree that they must set it aside.

He took up the errors assigned in the same order as that he adopted in arguing in support of the application in the preceding case, and he supported his propositions by the same authorities.

*C. L. Woodbury*, District Attorney, and *Milton Andros*, Assistant District Attorney for the United States.

1. The process invoked is not included in the grant to this court by the Process Act. There is no criminal jurisdiction for the United States court in criminal matters.

2. The averments in the indictment regarding the nationality of the vessel are such that the jurisdiction of this court attaches. For the limitations which have been put upon this jurisdiction, see *United States v. Bowers et al.*, 5 Wheat. 197. For those refused by the court, see the applications in *Furlong's Case* and in *Holmes's Case*.

The distinction between piracy and murder was elaborately argued by Mr. Marshall, afterwards chief justice, in *Nash's Case*, which see.

The act of 1825 was passed to distinguish piracy from murder. See Act 1790 ; also 5 Wheat.

The jurisdiction extends on board any vessel not belonging to

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a foreign nation, and this is the gist of *Nash's Case*. No American ship loses her nationality, except by a sale to a foreigner.

Statutes also extend to ships built after the act, or before the act, or ships forfeited for breach of laws and to foreign wrecked vessels.

The averments of residence and character of vessel are sufficient. Jurisdiction is matter *en pais*. Ship's papers are not decisive. *United States v. Bowers et al.* 5 Wheat. 199–204. 7th point, 206.

And the burden of proof is on the defendant. *Lyle v. Rodgers*, 5 Wheat. 419.

Is the allegation that the owners were citizens of the United States sufficient? *United States v. Furlong*, 5 Wheat. 203; *United States v. Hubert*, 4 Wash. C. C. 702.

Jurisdiction is not limited to vessels owned by citizens of United States. Congress has police jurisdiction on the high seas, irrespective of the nationality of the vessel, under its power to regulate commerce. See *United States v. Coombs*, 12 Pet. 72–78.

Acts 1820–1825 on slave-trade.

Act 1807, § 7, vessels hovering on the coast to land slaves.

Act 1847, § 1, alien vessels depredating on our commerce when there is a treaty with their country.

Act 1804, § 1, on burning ships.

Act 1825, § 4, murder or stabbing where the party dies on land. See also § 5.

So also in piracy, see below, and other offences against the law of nations.

*Prima facie*, parol proof of the averment was sufficient. *United States v. Peterson*, 1 Wood & M. 307; *United States v. Bowers et al.*, 5 Wheat. 204, 206. And the burden is afterwards on the defendant. *Lyle v. Rodgers*, 5 Wheat. 419.

The regularity of the ship's papers has no relation under these acts, 1825 or 1790, to the offence. *United States v. Peterson*, 1 Wood & M. 307, 313; *McClung v. Ross*, 5 Wheat. 119; *United States v. Bowers et al.*, 5 Wheat. 204, 206; *Lyle v. Rodgers*, 5 Wheat. 418; *United States v. Holmes*, 1 Cliff. 98.

The authorities cited for the prisoner, which refer to the forfeiture of ships, are not applicable, as the nationality remains unchanged by the forfeiture. Reference is made to the Registry Act, but it does not limit the scope of the acts of 1790 and 1825. Its objects are purely commercial. *United States v. Gibert*, 2 Sumn. 88.

CLIFFORD, J. Prior to the filing of the petition in this case, the prisoner had been indicted and convicted, in the Circuit Court for this district, of the crime of wilful murder upon the high seas, and out of the jurisdiction of any particular State, and having waived and withdrawn the respective motions for new trial and in arrest of judgment, which he filed subsequent to the verdict of the jury, he had been sentenced by the court to suffer the punishment of death, as provided by the act of Congress under which the indictment against him was found. 4 Stat. at Large, 115. Convicted, by the verdict of the jury, of the crime charged in the indictment, and having received the final sentence of the law, he was remanded to prison, under a warrant issued in due form for that purpose, where he remained awaiting the execution of the sentence, until the 2d of July, 1859, when the petition in this case was filed. Though the prisoner had withdrawn the motions usually employed in criminal cases to correct errors in the rulings and instructions of the court, and for arresting the judgment when the indictment is defective and insufficient, he still insists that there are defects and errors in the process and proceedings, and also in the record and judgment in the case, as set forth in the paper annexed to the petition, and marked "assignment of errors," and prays the court that "the record and judgment may be set aside, reversed, stayed, respited, reprieved, annulled, and held for naught, and that he may be discharged thereof, and be suffered to go without day." Eighteen supposed errors are set forth in the paper annexed to the petition, but they were classified at the argument under twelve heads, and it will be convenient for the court to follow the order adopted at the bar. Before considering the respective errors, however, as set forth in the paper before referred to, it becomes necessary to inquire and determine whether the Circuit Court



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possesses the power to re-examine, reverse, set aside, and annul its own judgments in such a case, in this form of proceeding. Nothing is better settled than the rule of decision that the Circuit Courts have no common-law jurisdiction in criminal cases, and it necessarily results from that proposition that the answer to the inquiry as to the power of the court to grant the prayer of the petition must depend upon the construction of the act of Congress organizing the judicial system of the United States, and other kindred acts upon the same subject. *United States v. Hudson et al.*, 7 Cran. 32; *United States v. Coolidge*, 1 Wheat. 415; *United States v. Bevans*, 3 Wheat. 336; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 563.

Acts not previously defined as an offence against the authority of the United States cannot be punished as such, as the United States have no unwritten criminal code to which resort can be had as a source of jurisdiction in such cases. Conkl. Treat. 168. Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. *Ex parte Boleman et als.*, 4 Cran 93; *United States v. Libbey*, 1 Wood. & M. 221; *United States v. Wilson*, 3 Blatch. 435.

Circuit Courts were created by the Judiciary Act, and they are courts of limited and special jurisdiction; and being without any common-law authority to try or punish offenders, except for contempt, they cannot exercise any power, in a criminal case, not derived expressly or impliedly from an act of Congress. Exclusive cognizance of all crimes and offences cognizable under the authority of the United States was conferred upon the Circuit Courts by the eleventh section of the Judiciary Act, except in cases where the same act authorized the District Courts to exercise the same jurisdiction; and the same section provides that the Circuit Courts shall have concurrent jurisdiction with the District Courts of the crimes and offences cognizable in the District Courts. 1 Stat. at Large, 79. Those exceptions from the exclusive cognizance of the Circuit Courts over crimes and of-



fences committed against the authority of the United States were comparatively few at that period of our history ; but the third section of the act of the 23d of August, 1842, provides that the District Courts shall have concurrent jurisdiction with the Circuit Courts of all crimes and offences against the United States, the punishment of which is not capital. 5 Stat. at Large, 517. Indictments for all offences against the United States may be found either in the District or Circuit Court, and may, on motion of the district attorney, and by the order of the court where pending, to be entered on its minutes, be transmitted from one court to the other for trial; except that indictments for capital offences found in either court are triable only in the Circuit Court; and, if found in the District Court, they must be remitted to the Circuit Court for that purpose. 9 Stat. at Large, 72. Except as to capital offences, the Circuit and District Courts, in the exercise of jurisdiction in criminal cases, are courts of concurrent and co-ordinate powers, the former bearing no relation whatever to the latter as an appellate tribunal. The authority to re-examine, by writ of error, final judgments in civil actions, rendered in a District Court, is conferred upon a Circuit Court where the matter in dispute, exclusive of costs, exceeds the sum or value of \$50 ; but the acts of Congress nowhere authorize the Circuit Courts to re-examine by writ of error, or in any other manner, the rulings or judgments of the District Courts in criminal cases. District Courts as well as Circuit Courts have power to grant new trials in all cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law, meaning the common-law courts of the State; and that power extends to the setting aside of verdicts in criminal cases as well as in civil actions in courts of original jurisdiction. New trials may be granted, in favor of the accused, to correct an erroneous ruling of the court in admitting improper testimony or in rejecting proper and material testimony, for misdirection of the court, or for the misconduct of the jury, or for newly discovered testimony, or because the verdict is against the evidence or the weight of the evidence, as in civil actions at common law. Judge Story held, in *United States v. Gibert et al.*,

2 Sumn. 19, that a new trial could not be granted in a case where the punishment was death ; but it is now everywhere held that a new trial may be granted in such a case, on the application of the accused. *United States v. Williams et al.*, 1 Cliff. 17 ; *People v. Morrison*, Parker's Cr. Cas. 624 ; 2 Ben. & H. Lead. Cr. Cas. 464 ; *Regina v. Scaife et al.*, 2 Den. & P. 281 ; *Campbell v. Queen*, 11 Ad. & Ell. N. S. 814 ; *King v. Queen*, 14 Ad. & Ell. N. S. 31.

Effective means are provided and ample facilities afforded to the accused, in a criminal case, for testing the jurisdiction of the court, and the sufficiency of the indictment, as far as such objects can be accomplished in the same court, without any such resort as that which is proposed in the case before the court. Before pleading, the accused may, if he sees fit, move to quash the indictment, setting forth as reasons one or both of those causes, and if that motion is overruled, he may demur to the indictment either generally or specially ; and the settled practice of the court is, that if the demurrer is overruled, the judgment of the court, if the charge is of the grade of felony, shall be *respondeat ouster*, as at common law. Both of these remedies are open to the accused before he is required to plead to the merits, and after verdict, if he does not prevail before the jury, he may file a motion in arrest of judgment, alleging the same defects ; and the rule is equally well settled that such a motion, like a demurrer, not only calls in question the jurisdiction of the court, and the sufficiency of the indictment, but extends also to any error in law which is apparent in the record.

Since the decision in the preceding case, it may be assumed without further argument that a writ of error from the Supreme Court to the Circuit Court, or from the Circuit Court to the District Court, will not lie in any criminal case, because there is no provision in any act of Congress authorizing any such proceeding, whether the charge be felony, or only a misdemeanor ; but if it be true that a writ of error may be sued out in this case, to be heard in the Circuit Court where the trial was had, and where the judgment was rendered, then the same right may be exercised in every criminal case as well in the District Court as in the

Circuit Court ; and the rule is just as applicable in misdemeanors as in the case before the court, which is expressly declared by the act of Congress to be a felony. Either the right exists without any limitation, or it does not exist at all ; and if it does exist, it may be exercised in every criminal case, whether the judgment was rendered in the District or Circuit Court, and whether the charge is a felony, punishable with death, or a mere misdemeanor. Seventy years having elapsed, or nearly so, since our judicial system was organized, the conclusion would seem to be a reasonable one that if there is any foundation for the right claimed to be exercised in this case, some trace of a prior exercise of it, or of a claim to exercise it in a criminal case, would be found in some reported decision of the Circuit or District Courts ; but no such decision is referred to, nor is it even suggested in argument that any such right in a criminal case was ever before claimed in either of those courts. Errors of fact in the process issued in a civil action, or such as happened through the fault of the clerk in the record of the proceedings prior to the judgment, might be corrected at common law by a writ of error sued out and returnable in the court where the action was commenced and where the judgment was rendered. When granted to re-examine a judgment rendered in the King's Bench, the writ was called a writ of error *coram nobis*, because it was founded upon a record and process described in the writ as remaining "before us," in accordance with the theory that the sovereign of the kingdom presided in the court. 2 Tidd's Prac. (Am. ed. 1856,) 1137 ; *Jacques v. Cesar*, 2 Wm. Saunders, 101, note 1 ; *Dewitt v. Post*, 11 John. 460. Such writs might also be sued out in the Common Pleas for a like purpose, that is, for the correction of errors of fact in the process of a civil action, or such as happened in the record of the proceedings through the fault of the clerk ; but the writ when sued out and returnable in the latter court was denominated a writ of error *coram vobis*, because the writ was directed to "you and your associates," meaning the chief justice and the other justices of that court. 1 Arch. Prac. (6th ed.) 504. Apart from the fact that these formal differences designated the particular court in which the judgment was rendered, and to

which the writ was returnable, they were never of any practical importance, as the office of the writ of error was the same in both courts. Where the error is one of fact, and not of law, a writ of error *coram nobis* in the King's Bench, or *coram vobis* in the Common Pleas, lies in the same court, as where the defendant, being under age, appeared by attorney, or where the plaintiff or defendant was a married woman at the commencement of the suit, or died before verdict, or before interlocutory judgment. 2 Tidd's Prac. 1137 ; 1 Arch. Prac. 504 ; 2 Sellon. Prac. 363.

Errors of the description mentioned are usually corrected in the Federal courts on motion to amend, supported, if need be, by affidavit ; but reported cases may be found in which it was claimed that a writ of error would lie in the same court to reverse the judgment on account of such defects. Instances of the kind are not numerous, but the practice is not entirely unknown, though it has never received the sanction of the Supreme Court. *Picket v. Legerwood*, 7 Pet. 144. Resort to that remedy has certainly been had in a few instances in the Circuit Courts in civil cases, but the writ of error is usually denominated a writ of error *coram vobis*, as it is directed to the justices of the court where the judgment was rendered ; and all the authorities agree that if the error be in the judgment itself, and not in the process, a writ of error does not lie in the same court to correct it ; and the Supreme Court has decided that it is not one of those remedies over which the supervising power of that court is given by law. *Picket v. Legerwood*, 7 Pet. 148 ; *Waldron v. Craig*, 9 Wheat. 576 ; 2 Sellon. Prac. 399. Called by whatever name the writ may be, strong doubts are entertained whether the Circuit Courts are authorized to re-examine their own judgments even in civil cases in that mode of proceeding, as the Judiciary Act contains no regulations whatever for the exercise of any such power. Such a writ, that is, the writ of error *coram nobis*, will undoubtedly lie in the King's Bench, as before explained, for the correction of errors of fact in the process, or for such as occurred through the misprision of the clerk ; and it is equally clear that the power to revise such errors in that mode, extends in that court to criminal cases as well as to civil cases, and that when exercised in the re-

examination of criminal cases, it extends to questions of law as well as questions of fact; but the better opinion is that the jurisdiction in criminal cases, except that it extends to questions of law as well as questions of fact, is no more comprehensive than in civil cases. *The Queen v. O'Connell*, 7 Law Rep. (Irish,) 356, 357; 9 Viner Abt. 491; 1 Fitzh. Nat. Brev. 2. Proceedings in error under that process do not anywhere extend to the judgment in civil cases, as a writ of error for that purpose must be brought in another and superior tribunal. *Picket v. Legerwood*, 7 Pet. 148; Roll. Abr. 746; Sellon. Prac. 363; 3 Bac. Abr. 366, error 6, 366; 3 Black. Com. 407, note 3; 4 Petdf. Abr. 255, error a, note 3.

Writs of error in case of treason or felony could never be sued out *ex debito justitiæ*, and it was necessary at common law, even in cases below felony, to obtain the *fiat* of the attorney-general, before the proper clerk could issue the writ. 1 Chitt. Cr. L. 369; *Rex v. Wilkes*, 4 Burr. 2551; *Lavett v. The People*, 7 Cow. 340; *Regina v. Aylesbury*, 2 Salk. 503; 2 Gude. Prac. Cr. Cas. 219.

Applications for a writ of error were never granted at common law without being first subjected to some preliminary examination; and the same remark may be made of the practice in the State courts in all cases where the applicant stands convicted of an offence punishable with death. 1 Arch. Cr. Prac. 717. Direct authority to grant a writ of error in a criminal case is not conferred upon the Circuit or District Courts, nor is there an act of Congress which contains any regulation upon the subject; so that if the right to the writ exists at all, it exists in every case, as a common-law right, whether the applicant was convicted and sentenced in the Circuit or District Court, and without any necessity that the writ should be previously allowed by the court or by the prosecuting officer. *Dugdale's Case*, 1 Dearsly's Cr. Cas. 78; 2 Gude. Prac. Cr. Cas. 219; *Rex v. Paty*, 2 Salk. 503; Arch. Plea. & Ev. (15th ed.) 167. Authority to grant the writ of error in this case, it is contended, may be deduced from the fourteenth section of the Judiciary Act, which provides, among other things, that the Federal courts "shall have power to issue writs of *scire*

*facias*, *habeas corpus*, and all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeably to the principles and usages of law''; but the jurisdiction of the court over the case, as given by the eleventh section of the act, was completed when the petitioner had been indicted, tried, convicted, and sentenced, and remanded to prison, and was there remaining awaiting the execution of the final sentence of the law, and the case had passed from the docket of the court. Other writs besides writs of *scire facias* and *habeas corpus* may be issued, it is said, though not specially provided for by statute, if they are necessary for the exercise of the jurisdiction of the court; and it must be conceded that such is the language of that clause of the section, but the very words of the section are, that such other writs may be issued when necessary for the exercise of their jurisdiction. Unless the writ is necessary to the exercise of jurisdiction already vested in the Circuit Court, the power to issue the writ cannot be deduced from that clause; but the uniform construction given to the provision is that Congress only intended to vest the power to issue such "other writs" in cases where the jurisdiction already existed, and not where the jurisdiction was to be acquired by means of the writ to be issued. *McClung v. Silliman*, 6 Wheat. 601; *McIntire v. Wood*, 7 Cran. 506; *Kendall v. United States*, 12 Pet. 624.

Completed as the proceedings in the case were, the Circuit Court, at the date of this application, had no more power over it than if the indictment had never been found. Examined closely, it is quite clear that the theory of the petitioner does not assume that the writ is necessary to the exercise of any jurisdiction conferred by any other provision in any act of Congress; but the argument is, that the clause in question confers the right to issue that writ, and that the power to grant the writ carries with it the power to exercise the jurisdiction under it as known and understood at common law. Grant that theory, and the consequence would be that the Circuit Courts would at once become courts of general jurisdiction, as the exceptions in the act of Congress may be supplied by the act of the court in issuing the appropriate writ under that clause of the fourteenth section of the Judiciary Act.

Apart from the power to issue "such other" writs in aid of jurisdiction already existing, there is no provision contained in the Judiciary Act which affords any support to the theory of the petitioner, nor does the act contain any regulations upon the subject; and the court is of the opinion that the construction attempted to be given to the clause referred to, is as unwarranted by its language as it is unsupported by the usages and practice of the Circuit Courts. Motions for new trial and in arrest of judgment are common in the Circuit Courts; but the settled practice is, that the latter as well as the former must be made before the sentence is pronounced. Such certainly was also the general rule at common law, but authorities are not wanting which assert the doctrine that the court might under special circumstances alter the sentence, or even arrest the judgment, without any motion being made, at any time during the same term, for good cause shown, or for errors apparent in the record. *King v. Price*, 6 East, 132; *King v. Waddington*, 1 East, 146; 1 Arch. Cr. Prac. & Plea. 186; *State v. Harrison*, 10 Yerg. 542; *Rex v. Lookup*, 3 Burr. 1901; *Miller v. Finkle*, Park. Cr. Cas. 374; Com. Dig. Indict. n. 1 Chitt. Cr. L. 663; *Commonwealth v. Hearsey*, 1 Mass. 139; *King v. Justs*, 1 Maule & Selw. 442; *Holden's Case*, 2 Leach, 1026. Extreme cases may be imagined where the court would be justified in exercising that extraordinary power, as if it appeared that the act of Congress under which the indictment was drawn had been repealed, or if it appeared in a case like the present that the person alleged to have been killed was in full life. Influenced by that consideration, and in view of the fact that a motion in arrest of judgment as well as a motion for new trial was seasonably made in the case, and withdrawn and waived, the court will examine the several causes of error set forth in the assignment annexed to the petition. Causes one and two may be considered together, as they have respect to the jurisdiction of the court. They are as follows:—

1. That there is no sufficient averment in the indictment that the Circuit Court had jurisdiction of the offence alleged to have been committed by the prisoner.
2. That there is no sufficient



averment therein that the supposed injured party was alleged to have been at the time within or under the protection of the United States, or in the peace thereof. Wilful murder, it is suggested, although committed upon the high seas, may not be cognizable in any Circuit Court of the United States, and the suggestion is doubtless correct; but the indictment in this case alleges in addition to those words, which are of essential importance, that the crime was committed "in and on board of" a certain ship called the "Junior, then and there owned by and belonging to" the four persons therein named, all of whom are alleged to be "citizens of the United States"; and the further allegation is, that all the criminal acts of the prisoner, including both the felonious assault, with malice aforethought, and the mortal wound which terminated the life of the deceased, were committed within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States. Exception in point of fact is not taken to any of these general averments, but the real objection of the prisoner is, that the allegation that the ship is owned by and belongs to certain citizens of the United States is not sufficient to show that the Junior was a ship of the United States within the meaning of the acts of Congress giving jurisdiction to the Circuit Courts in criminal cases. He refers to the first section of the act requiring ships and vessels to be registered, and insists that the first four counts of the indictment are bad because they do not contain the allegation that the Junior was a ship of the United States, but those counts and each of them do contain the allegation that the ship was "owned by and belonging to" certain persons therein duly described by their appropriate names, and it cannot be doubted that those words constitute a sufficient averment as to the ownership of the vessel, and inasmuch as the persons named as such owners are alleged to be citizens of the United States, the argument that the national character of the ship is uncertain on the face of the indictment, is entirely unsupported, and without any foundation. 1 Stat. at Large, 287. Ships and vessels are required to be registered or enrolled, it is conceded, in order to be entitled to the benefits and privileges which the



register and enrolment confer, but those documents are not indispensable in a prosecution for piracy or murder on the high seas, as the register or enrolment of the vessel may be in the name of one person while the property of the vessel is in another; and the rule is well settled that the property or national character of a vessel is matter *in pais*, and that it may be proved by parol testimony. *United States v. Griffin et al.*, 5 Wheat. 205; *United States v. Pirates*, 5 Wheat. 199. Indictments founded on the section under consideration must allege that the offence was committed out of the jurisdiction of any particular State as well as that it was committed upon the high seas, because those words are contained in the section defining the offence, and because the Circuit Courts have no jurisdiction of the crime of murder, even though the crime was committed on board a ship of the United States, as defined in the Registry Act, if the ship at the time was within the *fauces terræ*, as the enclosed or landlocked waters of a bay, creek, haven, or basin are not recognized, in criminal cases like the present, as forming a part of the high seas. *United States v. Bevans*, 3 Wheat. 386; *United States v. Ross*, 1 Gall. 624; *United States v. Smith*, 1 Mas. 147; *United States v. Robinson*, 4 Mas. 317; *United States v. Grush*, 5 Mas. 290; *United States v. Griffin et al.*, 5 Wheat. 205. Circuit Courts, it must be conceded, do not possess jurisdiction of the crime of murder when committed on board a foreign vessel, except to a very limited extent, and never where the perpetrator of the crime, and the deceased, were both foreigners. On the contrary, the general rule is that such courts have no jurisdiction of the offence even when committed upon the high seas, except when committed on board a ship or vessel of the United States, unless it appears that the vessel was sailing under no national flag. But persons indicted under that section cannot be shielded from the punishment annexed to the offence, because the master of the vessel did not have on board the register or the enrolment of the vessel, nor can they be so shielded even if it appear that the vessel was never legally registered or enrolled, if she was owned by and belonged to citizens of the United States, and that the deceased as well as the prisoner was in and on board the vessel at the time the felo-

nious homicide was committed. Proof of the most satisfactory character was exhibited to the jury that the deceased was a citizen of the United States, and that he was the master of the ship, duly appointed according to law ; that the prisoner was in and on board the ship when he committed the felonious assault, and inflicted the mortal wound ; that the ship was owned by and belonged to citizens of the United States residing at New Bedford, in this district ; that she was duly registered at the custom-house in that collection district ; that she sailed from that port on a whaling voyage ; that the alleged offence was committed by the petitioner while the vessel was cruising for whales, in the Indian Ocean, under the protection of the flag of the United States ; and the court is of the opinion that the allegations of the indictment are sufficient to warrant the introduction of those proofs, and consequently that there is no error in that part of the record. *United States v. Pirates*, 5 Wheat. 199. Suppose it was otherwise, still the judgment ought not to be arrested for that cause, as the fifth count of the indictment contains the allegation that the Junior was an " American vessel then and there belonging to a citizen or citizens of the United States." Two objections, however, are taken to that count, which will be briefly considered. 1. That the averment that the ship was an American vessel is not sufficient, as the words of the Registry Act before mentioned are " ships and vessels of the United States " ; but there is no merit in the objection, as the two phrases are used indiscriminately in the acts of Congress defining offences, and may well be regarded as synonymous in criminal pleading in the Federal courts, as applied to ships and vessels belonging to private owners. 2. That the count is also bad because it alleges that the names of the owners of the ship are unknown, whereas their names are set forth in the four counts preceding ; but the objection must be overruled, as the prosecutor is always allowed that privilege where the evidence is conflicting, or the real ownership is in any doubt. The next objection is founded on the third cause set forth in the assignment of errors, which is to the effect that the prisoner was not permitted to exercise his constitutional right of challenge to the jurors impanelled for his trial. Challenge for

cause is doubtless a constitutional right, as without its exercise the prisoner might be deprived of an impartial jury, but the peremptory challenge is a privilege conferred by law, which may be enlarged, abridged, or annulled by the legislative authority. Twenty peremptory challenges, however, are allowed by law in the Federal courts, to a prisoner charged with the crime of murder, and no trial in such a case would be a legal one if that privilege was not fully accorded to the prisoner. Four persons were joined in the same indictment in this case, and two counsel were assigned to each by the court, at their request, before they were required to plead to the merits, and they exercised the right of challenge to the full extent allowed by law, as was admitted by the counsel of the prisoner at the argument. They could not deny that fact; but the precise objection is that no such statement is set forth in the record of the case. Such facts are not usually set forth in the record, nor is it necessary that they should be where the right is fully enjoyed by the prisoner to his entire satisfaction and that of his counsel. Where objections are made, they should be entered in the minutes of the court, and if overruled, the court will save the question whenever thereto requested by the prisoner or his counsel. Causes four and sixteen will be considered together. They are as follows: —

1. That it does not appear by the record that the prisoner was present at the impanelling of the jury or at the trial; or, 2d, when the verdict was rendered by the jury. But it is not possible to sustain any one of those objections, as they are not correct in point of fact. By the record it appears that the prisoners were severally set at the bar, and had the indictment read to them, and that they severally pleaded that they were not guilty; that counsel were assigned to each as before explained; that they acknowledged that they had severally received a copy of the indictment and a list of the jurors, agreeably to law, and more than two days before the day of their trial; that a jury was thereupon impanelled and sworn to try the issue, and that the jury afterwards returned their verdict as set forth in the record. Tested by the record it appears that the whole proceedings took place on the same day, but the docket entries show the exact

dates of the several steps in the trial, from the finding of the indictment to the verdict and sentence. Properly construed, the record does show that the prisoner was present at every stage of the trial referred to in those causes of error. The complaint is made, in the next place, that the prisoner was not permitted to address the jury in his own proper person; but the decisive answer to the complaint is that he never made any such request, nor did his counsel in any way signify to the court that he desired any such privilege. He was duly indicted by a grand jury; was informed of the nature and cause of the accusation; was furnished with compulsory process for obtaining witnesses in his favor; was confronted with the witnesses against him; was allowed to have the assistance of counsel, and was "permitted to make his full defence by counsel learned in the law." Two counsel were assigned to him of his own selection, and both were permitted to argue to the jury in the close.

Attention will next be called to the sixth cause of error presented by the prisoner, which is that the verdict was rendered upon all the counts of the indictment, and that one or more of the same were defective, and insufficient in law to support the sentence. Evidently the proposition concedes that some of the counts are good, and it may be added that the argument fails to convince the court that any one of them is bad. Grant, however, that one or more of the counts are bad, still as it is conceded that some are good, the court is of the opinion that the objection must be overruled. Undeniably the rule at common law was, that a valid judgment could not be given in a civil case on an uncertain verdict, and that a verdict must be regarded as uncertain if any part of the damages are referable to a bad count; but the rule as universally acknowledged in criminal cases was, "that if there is one good count to support the verdict, it shall stand good, notwithstanding all the rest are bad"; and that is the settled rule in the Federal courts, and in all except one of the State courts. *Peake v. Oldham*, Cowper, 275; *Rex v. Benfield et al.*, 2 Burr. 986; *Rex v. Rhodes et al.*, 2 Ld. Raym. 886; *Rex v. Hill*, Russ. & Ry. Cr. Cas. 190; *Regina v. Ingram*, 1 Salk. 384; *Grant v. Astell*, 2 Doug. 730; *King v.*

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United States v. Plumer.

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*Young et al.*, 3 Term, 98; *Rex v. Powell*, 2 Barn. & Ald. 75; *Rex v. Fuller*, 1 Bos. & Pull. 180; *King v. Mason*, 2 Term, 581. Where there are several counts, some bad and some good, it is competent for the court, though the verdict is general, to render judgment on the good counts only, but it is not indispensable that any such discrimination should be made, as the presumption of law is, that the sentence was awarded on the good counts. *United States v. Furlong*, 5 Wheat. 201; *Josselyn v. Commonwealth*, 5 Met. 236; *Jennings v. Commonwealth*, 17 Pick. 80; *United States v. Burroughs*, 3 McLean, 405; *Parker v. Commonwealth*, 8 B. Monr. 30; 2 Whart. Cr. L. § 3047. Special attention is called to the case of *O'Connell et al. v. The Queen*, 11 Cl. & Fin. 155; but it is impossible to adopt that rule, as a different doctrine prevailed in the courts of that country, prior to that decision, for nearly two centuries; and when our ancestors immigrated here, they brought that rule with them as part of the common law, which cannot now be changed by the Federal courts. *Irvine v. Kirkpatrick*, 3 Eng. L. & Eq. 17. Sufficient to say that the matter of complaint set forth in the seventh cause of error is contradicted by the record and the docket entries. The allegation is that the acts of the court are stated in the past tense, but the theory of fact is not sustained in respect to any matter material to the validity of the judgment. Subsequent to the verdict the statement is, that the prisoner moves the court here that the verdict may be set aside, and a new trial granted for the causes therein set forth, numbered from one to ten inclusive, and that the prisoner after verdict and before judgment moves the court here that the judgment be arrested, etc., for the causes set forth in the motion filed at the same time, numbered from one to four inclusive, as appears by the respective motions on file. Time was allowed by the court for preparation, but the motions were set down for hearing at a given day. On the appointed day the counsel of the prisoner moved the court for leave to withdraw the motions, but the court refused to grant such leave until the prisoner was brought into court, and being inquired of personally, the record states that he "asks that such leave may be granted," etc., whereupon the court doth grant him

leave to withdraw the said motions, and the same are accordingly waived and withdrawn. Continuing, the record also states, said Plumer is then asked if he has anything to say why judgment of death should not now be pronounced against him, and having replied fully, and no good cause appearing, and all matters having been heard and understood by the court, then follows the sentence of the court, which is in the usual form, and is expressed in the present tense. The eighth cause assigned is, that it does not appear that issue was joined between the prisoner and the United States; but it does appear that he was set at the bar for his arraignment; that the indictment was read to him, and that he said that thereof he was not guilty, and that for trial he put himself upon God and the country, which is all that is required in such cases. Prisoners indicted for the crime of murder are certainly entitled to a list of the jury summoned in the case, two entire days, at least, before the trial. The ninth error assigned is, that it does not appear by the record that such list was furnished as required; but the docket entries show that the list was furnished, and the record shows that the prisoner acknowledged in open court before the jury were impanelled, that he did receive it two entire days prior to that time. Following the order adopted at the argument, the tenth, eleventh, twelfth, and thirteenth causes of error will be considered together, as they in fact involve but a single proposition. Taken together they allege that the record does not show of what felony the prisoner was convicted, nor for what felony he was sentenced. The offence is fully set forth in each of the five counts of the indictment, and the record shows that the jury found him guilty upon all of the counts, which is a complete answer to the first branch of the proposition. Sentences of the kind when pronounced by the court, are addressed to the prisoner, and of course are spoken in the second person, but the practice is to record the same in the third person, as in this case. Omitting redundant words, the sentence as recorded is to the following effect: it is considered by the court that the said Cyrus W. Plumer be deemed guilty of felony, and that he be taken back to the place from whence he came, and there remain in close confinement until Friday, the



24th of June next, and on that day, between the hours of eleven o'clock in the forenoon and one o'clock in the afternoon, he be taken thence to the place of execution, and that he be there hanged by the neck until he be dead. Apart from the first clause no objection is taken to the sentence, and none can be, as it follows in every particular the form used in every capital case in this circuit since our judicial system was organized. Uncertainty is the foundation of the objection, but two answers may be made to it, either of which is conclusive: 1. That the clause of the sentence, that the prisoner be deemed guilty of felony, is surplusage, and forms no part of the sentence required by law. 2. That the language employed must be construed as applied to the indictment and verdict of the jury, which are set forth in the record, and that the language, when so construed, is certain and free from any ambiguity. Founded as the indictment is upon the fourth section of the act of the 3d of March, 1825, it is clear that the statement that the prisoner be deemed guilty of felony was wholly unnecessary, as it is but the repetition of the legislative enactment, and that it is no part of the judgment of the court.

The repugnancy of the verdict to the clause giving jurisdiction to the court, is the matter included in the fourteenth cause. Five counts are contained in the indictment, and the verdict is that the prisoner is guilty. Sentence was passed upon all the counts; and the argument is, that in comparing the verdict with the jurisdictional clause of the indictment, the legal conclusion is that the prisoner stands convicted of more than one offence, and consequently that the verdict is repugnant to that clause which alleges that the prisoner was "first brought into the District of Massachusetts after committing the aforesaid offence," not offences, as it should have been in order to correspond with the verdict of the jury. But such criticism is too technical to prevail even in criminal pleading, as the several counts are obviously founded on the same homicide. They set forth the killing of the same person, on board the same ship, on the same day, and by substantially the same means; and, if it were otherwise, the proper conclusion would be, that the word "offence" in the jurisdictional clause applied severally to the respective counts, and not collectively, as

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contended by the counsel of the prisoner. Indictments must be signed by the foreman of the grand jury, but when the word "foreman" is appended to the name of the person signing the same as such, the signature is sufficient, as the designation "foreman" refers to the introductory clause of the indictment, and to the record, as verifying the legal inference that "foreman" means foreman of the grand jury. Remarks upon the last cause assigned, to wit, the eighteenth, are unnecessary, as it was conceded at the argument that it did not have respect to any defects, except such as are included in the special assignments to which reference has been made.

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MAY TERM, 1867.

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JOHN H. GOSSLER *et al.* v. JOHN C. GOODRICH.

Where an act specified that certain duties and rates of duty should be imposed upon certain imports in lieu of the duties heretofore imposed. *Held*, that the language was tantamount to a repeal of the prior rates of duty.

A person purchased certain sugars in a foreign port, and expressed an intention of shipping them to the United States, and the charter-party was for a voyage to a certain foreign port for a cargo, thence to New York or Boston as ordered. Before the ship sailed from the port at which she was lying, a stipulation was added to the charter-party, giving the charterers the option of sending the vessel to Falmouth for orders to discharge at one of the several enumerated foreign ports. Before the departure of the ship, the purchaser notified the parties through whom the purchase was made, that the vessel would not go to America. The bill of lading and all the papers were made out to send the vessel to Falmouth for orders, and the goods were consigned to Hamburg. When the ship arrived at Falmouth the purchaser then ordered her to proceed to Boston, where she arrived January 22, 1862. Duties upon the cargo were assessed and collected according to the act of December 24, 1861. *Held*, that such assessment was correct.

THIS was an action of assumpsit against the defendant, the Collector of the port of Boston, to recover the sum of \$29,112.04, part of the sum of \$40,350.70 paid, under protest, as duties upon a cargo of white and brown sugars, and was presented to the court upon facts agreed.



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The goods were imported in the ship Southern Cross. Markwald & Co. purchased the sugars under the directions of one Henry Devens, agent of the plaintiffs, and also a general agent of Gossler & Co., of Hamburg, of which firm two members were also members of the firm of Gossler & Co., of Boston.

When the ship was chartered she was lying at Macao, and the charter-party was for a voyage to Bangkok for a cargo, thence to proceed to New York or Boston, as ordered, for the sum of \$13,500 in American currency.

Before the ship sailed, however, from the port where she was lying, an additional stipulation was, at the request of Devens, appended to the charter-party, giving the charterers the option to send the vessel to Falmouth for orders, to discharge at London, Hamburg, or Bremen.

In such case the freight was to be £ 3,750, and the stipulation was, that orders should be given before the departure of the vessel from Bangkok.

Before the departure of the ship, Devens decided that the cargo should be sent to Falmouth for orders, and caused Markwald to be notified that the vessel would not go to America, but to Europe. Pursuant to his direction, the bill of lading, and all the papers were made out to send the vessel to Falmouth for orders, and the goods were consigned to Berenberg, Gossler, & Co., Hamburg.

It was agreed that the vessel accordingly proceeded to Bangkok, was there loaded, and then sailed for Falmouth, under the provision appended to the charter-party giving the charterer that option.

When she arrived there she was ordered by Devens, who had previously reached London, to proceed to Boston, where she arrived January 22, 1862, and on the 25th of the same month her cargo was entered for warehousing on behalf of the plaintiffs.

The plaintiffs contended that § 5, c. 45, Acts of 1861, 12 Stat. at Large, was operative in reference to the sugars; that the sugars were actually on shipboard and bound to the United States on the 5th of August, 1861, and therefore were liable to a

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duty of three fourths of a cent per pound, under § 5 (P.) c. 68, Act of 1861, 12 Stat. at Large, 179.

*C. L. Woodbury* and *M. E. Ingalls*, for plaintiff.

The goods were bound to the United States.

What is the meaning of bound to the United States, as used in the act of Congress of 1861? Does it mean that these goods, upon the 5th of August, 1861, were on their way to the United States, and in the most direct course between Bangkok and this country? Not by any means. It means simply this: that these sugars upon that day were intended for the markets of the United States, no matter when or by what route they were to be brought here. And all the plaintiffs have got to do is to furnish proof of that fact, such as would be sufficient to satisfy a jury of twelve men.

Were these sugars, then, upon the 5th of August, 1861, intended for the markets of the United States?

It is apparent from the facts, that on the 5th of August, 1861, these sugars in question, on board the Southern Cross, were intended for the United States market. That this intention was liable to be defeated by certain contingencies has no weight, because those contingencies did not take place, and the sugars did arrive here.

Then arises the further question, whether the fact that these sugars were imported by the way of Falmouth, not the most direct course, can have any influence? *Grant v. Peaslee*, 2 Curt. 250; *Millar v. Millar*, 2 Curt. 256; *Grinnell v. Lawrence*, 1 Blatch. 346; *Wilbur v. Lawrence*, 2 Blatch. 314.

Again, if these sugars were not intended for the United States market, on the 5th of August, when was such intention formed? For the sugars are here, and they could not have come here, unless brought here intentionally by the importers. Was this intention formed at Falmouth? Then these sugars were imported from England, and the collector should have ascertained their value in the principal markets of that country.

That he did not do this, when the facts were fresh in his mind, and all the parties to the transaction before him, is convincing proof that he did not believe at that time the theory which has since been devised in this case.

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The facts are in favor of the plaintiff upon this second proposition, and likewise the equities of the case.

The fifth section of the act of Congress of August 5, 1861, was not repealed upon the 3d of May, 1862, but was in full force and effect.

It is not repealed by this statute by express words. Is it repealed by implication ?

Repeals of statutes by implication are not favored, unless there is a positive repugnancy between the two acts.

The question to be considered then is this : Is there so clear a repugnancy between the act of Congress of December, 1861, and the 5th section of the act of August, 1861, that the earlier statute must give way to the latter ?

There is no repugnancy whatever, when we look at the intention of Congress and the spirit of their legislation.

In 1861, Congress made a radical change in the spirit of its legislation as to the collection of duties on imports. Previous to that time Congress had made the arrival of goods the date upon which new duties should attach. That is, if a new duty act happened to be passed upon the 20th of March, then all goods which arrived after the 19th of March were subject to the new duties.

By this rule goods became subject to new rates of duties, not when the importation commenced, nor when it ended, but in the midst of the act.

In 1861, Congress fixed the period of importation to be from the time when the goods were put on shipboard in the foreign country, until the duties were paid at the custom-house, and they also established the rule that legislation as to duties, whether increasing or decreasing them, should not operate upon goods in process of importation, unless it was so declared in specific words.

The first act of Congress which inaugurates this policy is that of March 2, 1861.

The real preamble to this act is in the fifth section, which is also the enacting clause for that tariff. It is in these words : "There shall be levied, etc., on goods, wares, and merchandise, herein enumerated and provided for, imported from foreign countries, the following rates and duties."

The meaning of the words "imported from foreign countries" is given in the thirty-third section, and is there defined to mean goods whose importation had not commenced by going on shipboard.

By saying in the thirty-third section that that act should not apply to goods on shipboard or in warehouse, they say that the words of the enacting clause should be like this: upon goods as to which the act of importation has not commenced by going on shipboard, the following duties shall be levied, etc.

The same language is used in the act of August 5, 1861.

That this was the intention of Congress is further seen by the joint resolution of January 11, 1862.

The act of December 24, 1861, increased the duties upon tea, coffee, and sugar. The Treasury Department construed it to impose the new duties upon goods in warehouse, and the attention of Congress was called to this construction, and they passed the joint resolution referred to, expressly negating the idea that they intended these new duties to apply to goods in process of importation.

By examining the act of July 14, 1862, we shall find further and stronger proof of this intention.

In the twenty-first section they expressly repeal a portion of the fifth section of the act of August, 1861, thus showing that they did not consider it repealed.

The language in the first part of the section is very significant with reference to the matter under discussion. It is in these words: "Goods which shall remain in the public stores or bonded warehouse for more than three months from the date of original importation, if withdrawn for consumption, and all goods on shipboard on the first day of August, shall be subject to the duties prescribed by this act." By the first section the act is to take effect on the 1st of August. Now if no change in legislation had been made by Congress up to that time, why specify that goods on shipboard on the 1st of August should be subject to the duties imposed by that act?

This would follow as of course if the old system of legislation was in force. It must be clear to every mind that why Congress

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particularly specified goods upon shipboard in this section was because they thought the exigencies of the government needed these duties, and they could not be collected unless mentioned.

*G. S. Hilliard* and *W. A. Field*, for defendant.

The date of the arrival of merchandise within the port of entry and discharge is the date of importation, and chapter second of the act of Congress of 1861, 12 Stat. at Large, 330, took effect on December 24, 1861, the day of its passage ; and all sugars arriving at a port of entry and discharge within the United States from a foreign port, on and after December 24, 1861, were subject to the duties expressed in said act, which are the duties actually levied. *United States v. Arnold et al.* 1 Gall. 348 ; S. C. 9 Cran. 104 ; *United States v. Vowell*, 5 Cran. 368.

The only provisions of law relating to the duties on sugars, intervening between the acts of the 5th of August, 1861, and the 24th of December, 1861, are contained in § 1, c. 45, Acts of 1861, 12 Stat. at Large, 292.

Section 33, c. 68, Acts of 1861, 12 Stat. at Large, 199, is in many respects similar to § 5, c. 45, Acts of 1861, 12 Stat. at Large, and the two are exceptional provisions in the statutes relating to customs.

The phraseology in chapter two, Acts of 1861, to wit, "that from and after the date of the passage of this act, in lieu of the duties heretofore imposed by law, on articles hereinafter mentioned, there shall be levied, collected, and paid, on the goods, wares, and merchandise herein enumerated and provided for, imported from foreign countries, the following duties and rates, that is to say," is substantially the same phraseology used in all acts relating to customs duties, passed since the establishment of the government, some acts going into effect on the day of passage, and others on a day named in the act. § 1, Act of 1789, 1 Stat. at Large, 24 ; § 1, Act of 1790, 1 Stat. at Large, 24 ; § 1, Act of 1791, 1 Stat. at Large, 199 ; § 1, Act of 1792, 1 Stat. at Large, 259 ; § 1, Act of 1794, 1 Stat. at Large, 390 ; Act of 1795, 1 Stat. at Large, 411 ; § 1, Act of 1797, 1 Stat. at Large, 503 ; § 1, Act of 1800, 2 Stat. at Large, 84 ; § 2, Act of 1804, 2 Stat. at Large, 299 ; Act of 1812, 2 Stat. at Large, 768 ; § 1,

Act of 1816, 3 Stat. at Large, 310 ; § 1, Act of 1824, 4 Stat. at Large, 25 ; § 1, Act of 1828, 4 Stat. at Large, 270 ; § 2, Act of 1832, 4 Stat. at Large, 583 ; Act of 1841, 5 Stat. at Large, 463 ; §§ *et seq.* Act of 1842, 5 Stat. at Large, 549 ; §§ *et seq.* Act of 1846, 9 Stat. at Large, 42 ; § 1, Act of 1857, 11 Stat. at Large, 192 ; Act of 1861, 12 Stat. at Large, §§ 5 – 25, 33 ; Resolution No. 15, § 2, 12 Stat. at Large, 252, c. 45, 1861 ; 12 Stat. at Large, 292, §§ 1, 5 (the act being an act to provide increased revenue) ; Act of 1863, 12 Stat. at Large, 742 ; § 1 *et seq.* Act of 1864, 13 Stat. at Large, 202 ; § 2 *et seq.* Act of 1865, 13 Stat. at Large, 493 ; Act of 1866, 14 Stat. at Large, 8 ; § 1, Act of 1866, 14 Stat. at Large, 328 ; Act of 1867, 14 Stat. at Large, 559.

It thus appears that the time of arrival of goods within a port of entry and discharge is the date of importation, and the duties established by law at the time of such arrival are the duties imposed on such goods ; that Congress has not in general regarded the time of exportation in levying duties, and that section thirty-three of the act of March 2, 1861, and section five, act of August 5, 1861, are exceptional in reference to regarding the time when goods were put on shipboard, and bound to the United States, as the time at which duties accrue ; that in reference to tea, coffee, and sugar that exceptional policy was abandoned by the act of December 24, 1861 ; c. 2, act of 1861 ; and in reference to all goods by the act of July 14, 1862, c. 163 ; 1862, § 21.

Chapter two, 1861, is entitled “ An act to increase the duties on tea, coffee, and sugar.”

Sections thirty-three and thirty-five, *ubi supra*, do not purport to give a statutory definition of the word “ imported ” in the revenue sense ; the language is not “ that goods, wares, and merchandise shall be held to be imported when they are actually on shipboard and bound to the United States.” These sections leave the meaning of the phraseology — “ there shall be levied, collected, and paid on goods, wares, and merchandise imported into the United States, the following duties, that is to say ” — unaltered, and that meaning was established and well known.

These sections are exceptions in terms from the legal operation of such a phraseology. Chapter two, 1861, *ubi supra*, does not in

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terms impose additional duties, but duties in lieu of duties, and contains no exceptions, and establishes a duty of two and a half and three cents on all brown and white sugars imported on and after December 24, 1861.

But even if the law were as the plaintiffs contend, the facts do not bring this case within the language of the said section five.

The goods were not bound to the United States, and this fact alone is decisive. The sugars were consigned to J. Berenberg, Gossler, & Co., of Hamburg, and not to persons within the United States.

Until after the order was given that the Southern Cross should proceed to Boston, these sugars were as truly bound to London, Hamburg, or Bremen, as to Boston or New York.

These facts in this case are distinguished from *Grant v. Peaslee*, 2 Curt. 250 ; *Millar v. Millar*, 2 Curt. 256 ; *Warren v. Peaslee*, 2 Curt. 231 ; *Grinnell v. Lawrence*, 1 Blatch. 346 ; *Griswold v. Maxwell*, 3 Blatch. 145. See *Sampson et al. v. Peaslee*, 20 How. 571 ; *Irvine et al. v. Redfield*, 23 How. 170.

The construction that a vessel must be actually bound, in the sense of actually proceeding to the United States, gives force to all the words of the clause of section five, and seems analogous to the construction put upon other clauses of the statutes relating to customs.

CLIFFORD, J. Raw sugar, called muscovado, and brown sugar, not advanced beyond the raw state, under the act of the 2d of March, 1861, was subject to a duty of three fourths of one cent per pound. Refined sugars were subject to two cents per pound, whether loaf, lump, crushed, or pulverized. 12 Stat. at Large, 479. All goods, wares, and merchandise, under the act of the 5th of August, 1861, entitled "An act to provide increased revenue from imports," which were actually on shipboard and bound to the United States, were subject to pay only such duties as were provided by law before, and at the time of the passage of that act. 12 Stat. at Large, 293. Rates of duty on sugars were increased by the act of the 24th of December, 1861 ; and the parties agree that the rates of duty assessed and collected in this case, are those expressed in that act, which went into effect at the



date of its passage. The language of the provision is, that from and after the date of the passage of this act, in lieu of the duties heretofore imposed by law, on articles hereinafter mentioned, there shall be levied, collected, and paid on the goods, wares, and merchandise herein enumerated and provided for, imported from foreign countries, the following duties and rates of duty, that is to say, tea, coffee, and sugars, as therein classified and provided.

Observe that these "duties and rates of duty" are imposed in lieu of the duties heretofore imposed by law on the articles therein mentioned. Direct repeal would be no stronger, as it is expressly enacted that the increased duties and rates of duty shall be imposed in lieu of the duties heretofore imposed by law. Terms more explicit and comprehensive could not be employed, and the provision neither contains any exception, nor admits of any, without the necessity of resorting to positive legislation.

Goods actually on shipboard, and bound to the United States at the date of the prior act, were specially exempted from its operation, and were only required to pay such duties as were previously provided by law; but the act of the 24th of December, 1861, under which the duties in this case were assessed and collected, contains no such exception, and there is nothing in any other act of Congress which affords any support to the theory of the plaintiffs.

Reference is made to the joint resolution of the 11th of January, 1862, as affording support to that theory, but it is clear that it cannot be construed to have any such effect, as it is expressly limited to goods warehoused at the date of the passage of the act, entitled an act to increase the duties on tea, coffee, and sugar. Viewed as a provision for one class of goods only, and that a different one from the importation in this case, the argument from it is rather against the theory of the plaintiffs than in their favor. *Expressio unius est exclusio alterius.*

Suppose it were otherwise, however, and that it can be admitted that the provision in the prior law, exempting goods actually on shipboard, and bound to the United States at the date of the new enactment, was in full force, still we are of the opinion that the plaintiffs ought not to prevail, because it is clear, we think,



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that the goods constituting the importation in this case were not, on the 5th of August, 1861, bound to the United States.

Plaintiffs concede that they cannot prevail, unless the agreed statement shows that the goods were actually on shipboard at that date, and bound to the United States.

Having come to the conclusion that the goods were not at that date bound to the United States, it is not necessary to decide whether, on the facts agreed, they were, or were not, actually on shipboard, and we express no opinion on that point.

Undoubtedly the case shows that the person who purchased the goods expressed an intention to make the purchase, and ship the goods to the United States ; but the record contains the most plenary evidence that he changed his mind, and that the goods were actually purchased, shipped, and forwarded to Falmouth, without any definite intention to import them here, and with the right expressly reserved to discharge at London, Hamburg, or Bremen. They were invoiced in the name of a foreign house, and consigned to Berenberg, Gossler, & Co., of Hamburg. Bills of lading were signed by the master, wholly inconsistent with the theory of the plaintiffs, and the vessel actually cleared for Falmouth, and for orders. The shippers were bound by the charter-party to make their election before the ship sailed, and they made it as required, and gave notice in writing.

Other questions were discussed at the bar, but in the view of the case we have taken it is not necessary to examine them, as the points actually decided dispose of the controversy.

The duties were correctly computed and properly collected, and according to the agreement of the parties, there must be judgment for the defendant, with costs.

MAINE DISTRICT.

SEPTEMBER TERM, 1867.

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ARTHUR B. NICHOLS v. THE INHABITANTS OF BRUNSWICK.

The surface of a travelled street or highway, about two rods wide, in a village, was in all respects in good condition, and had been repaired from time to time by the town authorities. At a certain point by the side of the road was a cellar, about four feet deep, the line of the wall of which extended within the line of the street. No building had existed over the cellar for a period of about eight years, nor had the town, for about that period of time, erected or maintained any guard or railing against the excavation. *Held*, that this was not, under the statute of Maine, such a condition of repair as to be safe and convenient for travellers with teams, horses, and carriages.

An accident occurred at this point under the following circumstances: A person driving one horse in a chaise stopped near the cellar, and turned the animal to one side, in order to admit some one into the carriage. The driver then attempted to turn the horse sufficiently to bring him into the road, but the horse came back too far, and began to back; he then slapped the animal with the reins to start him forward, and the horse stopped, but the rear wheels were then passing over the cellar-wall, and the plaintiff, in attempting to jump out was caught by the fender, and together with horse and vehicle fell into the cellar. *Held*, that these facts were not sufficient to establish the defence of want of the exercise of ordinary care on the part of the person injured.

Under these circumstances, plaintiff was entitled to recover damages against the town for the injuries received in consequence of a defective highway. As to the amount, the plaintiff is to recover a just compensation for his injuries, which are to be estimated by an examination of all the facts of the accident, and of the plaintiff's condition in consequence thereof.

Mere opinions of physicians that ill-health, subsequent to the injury, was occasioned by it, must be received with caution, and weighed in view of all the circumstances surrounding the case.

TRESPASS on the case, to recover damages on account of an injury received as alleged, through a defect in a highway, which the corporation defendants were bound by law to keep in repair.

The injury was received on Pearl Street, nearly opposite the dwelling-house of one Edward White, who lived on the northerly side of the street.

The alleged defect consisted of a cellar nearly opposite White's dwelling-house.

There was no fence or railing against the cellar.

White had lived in his house nearly thirty years, and when he first took up his abode at that place there was a currier's shop over the cellar, but the shop was burned some ten or twelve years before the accident.

Before the shop was burned the highway or street was fenced on both sides.

White's and the adjoining lot were fenced when he went there, and there was a continuous line of fence for a considerable distance on that side.

The proofs showed that the front of the shop on the other side of the street, was on the line of the street, and that there was a fence on each side of the street on the same line.

It was conceded that the shop was not rebuilt; and the evidence showed that the back of the cellar-wall, on the line of the street, extended within the line of the street on that side; that the top of the wall was nearly or quite level with the street, and that it was without fence or railing.

Repairs had been made on the street, and the travelled way was slightly turnpiked, causing a depression on each side of the travelled part, of seven inches at the greatest depth, and having a space of three feet in width on the outer sides of the gutters, for sidewalks.

Except the absence of a fence or railing against the cellar, the street was in good repair, and was safe and convenient as a street of that width.

The cellar was four feet deep, and there were large rocks in it, besides those in the walls.

When the shop was burned, or shortly after, a fence was erected on the line of the street, against the excavation, but it was soon blown down, and had never been rebuilt at the time of the accident.

The following is a summary of the plaintiff's testimony : —

Late in the afternoon of July 17, 1861, he went to a stable in Federal Street, into which Pearl Street runs, and hired a horse

and chaise and drove to his own house, where his wife got into the carriage.

They drove around the village for about two hours, at the expiration of which he returned to his house, left his wife, and started to return the horse and vehicle to the stable.

After returning to his house, and attempting to turn the carriage, after his wife had got out, he found that the street was not wide enough for the purpose, and to obviate the difficulty, he first turned the horse to the left, then "backed" a little way, and then pulled the right-hand rein, and guided the animal around to that side.

Having done so, he started to go to the stable, and had proceeded a few rods, — opposite White's house, — when he saw one Henry F. Gordon, on the north side of the street, travelling the same way.

Thereupon he stopped, turned the horse to the right, and invited Gordon to ride with him. Gordon went around to the left side of the carriage and got in.

After this the plaintiff drew the other rein, to bring the horse back into the road; and the witness said "the horse came back too far, and commenced to back."

Perceiving this, he slapped the horse with the reins, to start him forward and stop him from backing.

Gordon jumped out at the same time, and the horse stopped, but the rear wheels of the carriage were then passing over the cellar-wall.

The plaintiff also attempted to jump out, but fell over the fender into the cellar, and was instantly followed by the carriage and horse.

There was some testimony concerning the character and habits of the horse, and a description of the condition of the plaintiff consequent upon the injury, but sufficient allusion to these points is to be found in the opinion.

*Strout and Gage*, for plaintiff.

*John Rand and George E. B. Jackson*, for defendants.

CLIFFORD, J. Towns in this State are required to keep their highways, town ways, and streets in such repair that they shall be

safe and convenient for travellers with horses, teams, and carriages. Rev. Stat. 224. Persons who receive any bodily injury, or suffer any damage in their property, through any defect, or want of repair, or sufficient railing in any highway, town way, causeway, or bridge, may recover for the same of the county, town, or person bound to keep the way in repair, provided that it appear that the county, town, or person, as the case may be, had reasonable notice of the defect, or want of repair, and that the plaintiff at the time he received the injury was in the exercise of ordinary care. Rev. Stat. 227. Repeated decisions in this State show that the right to recover in such cases depends upon the following conditions, and that they must all concur, before it can be held that the defendants are liable: —

1. That the highway was one that the inhabitants of the town were bound to keep in repair.

2. That it was defective, and out of repair at the time of the accident.

3. That the plaintiff was injured as alleged in his declaration.

4. That the town had reasonable notice of the defect.

5. That the plaintiff was in the exercise of ordinary care, when he received the injury.

6. That the injury was occasioned solely through the defect in the highway, and not from any negligence or want of ordinary care on the part of the injured party.

The existence of the highway is not controverted, and it is conceded that the town was bound to keep it in repair. Satisfactory proof of user as such, even for a period of more than twenty years was introduced by the plaintiff; and he also proved that the proper authorities of the town had made repairs on it within six years before the injury, which of itself estops the town to deny the location. Rev. Stat. 228. Defendants deny that the highway was defective, and that denial presents the first issue of fact between the parties. Uncontradicted evidence showed that the highway was only two rods wide, but that it was level, and in good repair in all respects, except that it had no fence or railing at the place where the plaintiff was injured.

Unguarded as the street was at that place by any fence or

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railing, I am of the opinion that the excavation rendered the street unsafe, inconvenient, and dangerous to travellers. Evidence of the injury to some extent is full and satisfactory, and the fact is not controverted by the defendants. Notice of the defect in the street, if the excavation is found to be one, is also very properly conceded by the defendants, as the evidence is full to the point, and all one way. Means of knowledge upon the subject were open to all the inhabitants, as the defect had existed for more than ten years, and the witness who lived on the opposite side of the street testified that, several years before the plaintiff was injured, he notified one of the selectmen that this was a dangerous place in turning, and that it ought to be fenced.

Suppose these four issues to be found for the plaintiff, still, the defendants deny that he is entitled to recover, because they insist that he was not in the exercise of ordinary care at the time of the accident, and that the injury he received was not occasioned solely through the defect or want of repair in the highway. These two defences may be considered together, as the circumstances relied on in their support are either substantially the same or blended with each other so that they cannot well be separated. Pearl Street runs into Federal Street, and extends in an easterly direction a considerable distance beyond the dwelling-house occupied by the plaintiff.

[After a review of the details of the accident, the court say :]

Such is the substance of the circumstances attending the accident, as proved by the plaintiff and the person who was with him when it occurred, and it is difficult to see how any one who reads can impute to the plaintiff any want of ordinary care in driving, or in his efforts to avoid the peril. The accident occurred towards eight o'clock in the evening, but it was not dark, and there is nothing in the circumstances attending it to authorize the conclusion that the plaintiff was guilty of any degree of negligence. On the contrary, they warrant the conclusion that the plaintiff, if he had a suitable horse and carriage, was at the time in the exercise of ordinary care, as required by law, to entitle him to recover damages of the defendants for the injuries

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he received. No objection is made to the sufficiency of the carriage, but it is insisted that the horse was unsuitable, and that the injury was not occasioned solely through the defect or want of repair in the highway. Many witnesses were examined on this point, and there is considerable conflict in the testimony. Where an issue in the case depends upon conflicting testimony, parties must be satisfied with the statement of the conclusions of the court, as it would extend an opinion to an unreasonable length to relate the details of the testimony as given by the several witnesses.

Defendants' witnesses testify that the horse was accustomed to back, and that he was a vicious horse. On the other hand, the plaintiff's testify that the horse was kind, safe, good driving, and without any such vice as is ascribed to him by the defendants. Nothing appears in the circumstances attending the accident to afford any support to the views of the defendants, except that the horse backed, as he had just been made to do, in front of the house of the plaintiff, in order to enable the plaintiff to turn the carriage in that narrow street. When the rein was drawn by the plaintiff, to bring the horse straight in the road, he came round too far, and backed, but when slapped with the reins he stopped; and it seems highly probable that the accident would not have happened if there had been a fence or railing around the excavation. Most of the defendants' testimony as to the character of the horse refers to his conduct when under harsh training by an owner as a means of augmenting his market value. During the period of those appliances he was known to back, as proved by that owner and other witnesses who saw him driving the horse. But many witnesses called by the plaintiff, who had owned or known and driven the horse, both before and after the period when he was in the possession of that owner, testify that the horse was kind, safe, gentle, and good driving, and that he had no such vice as that charged by the defendants. Considered altogether, the weight of the evidence is greatly on the side of the plaintiff, and it shows to the satisfaction of the court that the injury was occasioned solely through the defect or want of repair in the highway. Plaintiff therefore is entitled to recover for the

injury he received; and the only remaining question is, as to the amount of the damages.

The statement of the plaintiff is, that his side struck the rocks when he fell into the cellar, and that the horse, as he fell into the cellar, struck him on his back and jammed him on to the rocks; but he got out of the cellar, and was able, with the assistance of his wife and one other person, to walk to his own house. He complained of injury in his back, right knee, and second finger of his right hand; suffered a good deal of pain; sent for a physician, who ordered that his back should be rubbed with wormwood and spirits; put a plaster on his right side, and something on his knee, which healed up in about a week; confined to his house eight or ten days, and used crutches for some two months; not able to work after he got out; pain in right side, and kneepan troubled him ever since, and always worse when he gets cold. He states that he has not been able to do half a man's work since the injury. His wife was also examined and confirmed his statements as to his visible injuries, suffering, and inability to labor. Two physicians were also examined, who expressed strong doubts whether the plaintiff would ever regain his vigor which he had before the injury.

The rule of law is plain that the plaintiff is entitled to a just compensation for his injuries, but the estimation of the amount is a matter attended with great difficulty. Injuries apparently slight may prove to be serious, and those supposed to be serious may prove slight under skilful treatment. Subsequent ill-health and debility may result from such an injury, or they may result from other causes wholly distinct. Mere opinions of physicians, that such complaints are consistent with the theory that the difficulty results from the injury, or is the effect of it, must be received with caution, and weighed in view of all the uncertainties which surround the case.

Impressed with these views, and anxious to administer justice between the parties, the court has attentively examined the whole testimony given to the jury, and the additional testimony introduced to the court. Considering the whole case, in all the circumstances, the court is of the opinion that the



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plaintiff do recover of the defendants the sum of \$900 and costs of suit.

The direction of the court is, that judgment be entered for the plaintiff, for \$900 and costs.

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ARTHUR B. NICHOLS v. INHABITANTS OF BRUNSWICK.

Both before and since the passage of the act of the 6th of February, 1868, costs have been allowed in this court to the prevailing party for travel and attendance.

Where a party is called and examined as a witness in his own behalf he is not entitled to travel and attendance as a witness.

THE facts are sufficiently apparent in the opinion.

*Strout and Gage*, for plaintiff.

*John Rand and George E. B. Jackson*, for defendants.

CLIFFORD, J. Judgment was ordered in favor of the plaintiff at a previous day in the term, for \$900 and costs of suit. Since that time the costs have been taxed, and the taxation presented to the clerk for approval. Plaintiff, being the prevailing party, claimed that he was entitled to tax travel and attendance, according to the uniform practice of the court. Defendants object to those items in the taxation, and, after hearing the parties, the clerk disallowed the same, and the plaintiff appealed to the court.

Federal courts were organized by the act of Congress passed on the 24th of September, 1789, commonly described as the Judiciary Act. 1 Stat. at Large, 73.

Costs are recognized as following the judgments or decrees in several sections of that act. Where the minimum or maximum sum of jurisdiction is prescribed, it is in every case declared that the sum specified is exclusive of costs. 1 Stat. at Large, 77, 78, 79.

So where a plaintiff in an action originally brought in the Circuit Court, or a petitioner in equity, recovers less than the sum of \$500, the provision is, that he shall not be allowed costs, but may be adjudged to pay costs at the discretion of the court. 1 Stat. at Large, 83.

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Other sections also of the same act recognize the right of prevailing parties to costs ; but the act contained no fee bill, and none was passed by Congress until the act of the 8th of May, 1792, entitled an act for regulating processes in the United States courts, except the Process Act of the 29th of September, 1789, which adopts the rates of fees that prevailed in the Supreme Court of the State. 1 Stat at Large, 93-275.

But the Judiciary Act authorizes the Federal courts to make and establish all necessary rules for the orderly conducting business in the said courts, provided that such orders are not repugnant to the laws of the United States. 1 Stat. at Large, 83.

Pursuant to that authority, or under the Process Act, the Circuit Court of the United States for this district adopted the fee bill of the Commonwealth. Maine at that period was a part of Massachusetts, and, although erected into a separate district, was a part of the same circuit, and was governed by the same rules of practice.

Parties in the courts of the Commonwealth, at the date of the Judiciary Act, were entitled to one shilling and sixpence for each day's attendance, and the provision was that ten miles' travel, should be accounted as one day. Act March 1, 1787.

Prevailing parties were accordingly allowed one shilling and sixpence for each day's attendance in the Circuit Court or in the District Court of Massachusetts, and the same amount for ten miles' travel. *Thomas Jenkins v. Theodore Sedgwick*, Mass. Dist. Nov. T. 1790 ; *Matthew Byles v. Isaac Hill*, Mass. Dist. May T. 1791.

Congress, on the 2d of April, 1792, enacted that the money of account of the United States should be expressed in dollars and cents, and that all accounts in the public offices, and all proceedings in the courts of the United States, should be kept and had in conformity to that regulation. 1 Stat. at Large, 250, § 20.

Taxation of costs was still made in pounds, shillings, and pence, under the law of the State, but the several amounts were brought into Federal money in making up the judgment in the Circuit Court. Proceedings were continued in that form until the law

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of the State was changed, except so far as the taxation of costs was regulated by the fee bill in the act of Congress to which reference has been made.

On the 13th of February, 1796, the Legislature of the State passed a law allowing parties entitled to costs thirty-three cents for each day's attendance and travel,—ten miles to be accounted one day. 1 Mass. Laws, 476, 481.

That provision was re-enacted in 1804, and made permanent. 2 Mass. Laws, 100.

Immediate change was made in the practice in the Circuit Court in the taxation of costs, in conformity to that provision, and the rate adopted at that time has been followed to the present time, without any variation. *Arthur Robbins v. William Witmore*, Mass. Dist. Oct. T. 1796.

Fees of marshals, clerks, district attorneys, jailers, and witnesses were regulated by the act of the 8th of May, 1792, but inasmuch as the provision was silent as to the travel and attendance of parties, the taxation was continued as before, and the practice received the sanction of the Federal judges of that day.

Acts of Congress upon the subject of fees have several times been passed, but as none of the provisions referred to the travel and attendance of parties, it has never been doubted that those items were properly the subject of taxation in favor of the party entitled to judgment.

The compensation allowed by law in the Federal courts to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners, and printers is prescribed by the act of the 26th of February, 1853, and the provision of the first section of the act is, that the prescribed compensation shall be in lieu of the compensation previously allowed by law, and that no other compensation shall be taxed and allowed. Undoubtedly that provision is in full force, but it makes no reference whatever to the taxation of costs to the prevailing party. Although it is more comprehensive and enters more into detail than the prior regulations upon the subject, still it is clear that it does not embrace the parties to the suit.

Since the passage of that act as well as before, costs have been

allowed to the prevailing party for travel and attendance, and in cases where terms are imposed by the court as a condition to an order granting a continuance. Such allowances rest upon the original regulations of the Circuit Court, sanctioned by the uniform practice of the court, and not forbidden by any act of Congress.

Where a party is called and examined as a witness in his own behalf, he is not entitled to travel and attendance as a witness. He may be sworn or not in his own favor, at his election, but he cannot claim any compensation for doing what he may omit, if he sees fit. In other words, the law gives him the privilege to introduce his own testimony if he sees fit, but cannot require the opposite party to pay him for exercising the privilege which the law confers.

Correct the taxation in accordance with this opinion.

## HENRY L. FEARING v. HENRY C. CHEESEMAN.

Where in a charter-party no stipulation is made as to the day the vessel should sail, or the time she was to be allowed for the trip, the rule of construction is, that she is to sail within a reasonable time, and to proceed with reasonable despatch, and without unnecessary deviation, to the place of loading, unless delayed by the public enemy or perils of the seas.

Such an implied covenant in a charter-party is not a condition precedent, which, if broken, will justify the charterer in disregarding his covenants, unless the delay is so great that it deprives the charterer of the whole benefit of the contract or frustrates his object in chartering the vessel.

A stipulation in a charter-party that the charter should commence when the vessel was ready to load, does not mean that the charter-party does not attach until the vessel arrived at the place of loading. Performance of the implied contract, that the vessel was to sail to the place of loading within a reasonable time, was as requisite as that notice of the readiness of the vessel to receive cargo should be given on arrival at the place of loading.

A charter-party was executed April 27, 1865, while a vessel was laying in the harbor of Boston, by which she was to load at Farmingdale, Maine. No stipulation was made concerning the time at which she was to sail for the place of loading. She arrived at Farmingdale, May 20. When the master gave the required notice of the readiness of the vessel to receive cargo, the charterer refused to load her. Thereupon the following correspondence took place. From the charterer: "Will load the vessel at going rates; no other terms, damages or not." To which the owners replied that the charterer must

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"either load her per charter-party or pay damages." To this the following reply was received: "Will load vessel for the voyage at eight dollars, measurement or weight, difference between old and new, charter open, to be settled by the courts or by arbitration, without prejudicing the rights of either party." The final reply was: "We accept your proposition; load vessel as per despatch of this date." Thereupon the defendants loaded the vessel, and the cargo was duly transported and delivered. *Held*, that no new charter-party was made by the above correspondence, and that the respondent was liable unless he could show that the master, in failing to report the vessel within a reasonable time, had violated some condition precedent, or that the delay was so great as to frustrate the voyage.

A vessel was chartered April 27, 1865, at Boston, to go to Farmingdale, Maine, for a cargo of ice, to be transported to Mobile, Alabama. From stress of weather, she did not arrive at Farmingdale until May 20, when she reported as ready to receive cargo. The charterers had then hired and loaded another vessel, with the cargo destined for the first chartered vessel, on the arrival of which, however, they changed the destination of the vessel last hired and sent her in fulfilment of another contract, and the vessel first named actually performed the contract for which she was chartered, and the cargo was received without complaint. *Held*, that the facts showed that the voyage was not frustrated by the delay to notify, that the vessel was ready to receive cargo, and that the owners were entitled to recover under the charter.

ADMIRALTY appeal. Libel to recover a balance of the stipulated price under a charter-party.

The libellant was the owner of the brig *Star of Hope*, and the appellants were the charterers. The charter-party was executed at Boston, Massachusetts, on the 27th of April, 1865, and was for a voyage from Farmingdale, Maine, to Fort Gaines or Mobile, Alabama. The owner let the ship for freight, and engaged that she should be kept seaworthy during the voyage, and to provide her with men and provisions. The charterers agreed to furnish her with cargo, sufficient for lading or ballast, and to pay the owners \$4,250, as charter-money for the voyage.

When the charter-party was executed the vessel was lying in the harbor of Boston, and the charter-party contained no stipulation as to the time when she was to sail to her place of lading. Provision was made for lay-days for loading and discharging, and the stipulation was, that they were to commence respectively from the time that the master should report that he was ready to receive or discharge.

The following were the precise terms of the stipulations as to lay-days: "Despatch in loading at Farmingdale, and ten working days at port of destination."

The charter was to commence when the vessel was ready to

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receive cargo at the place of loading, and notice thereof was given by the master to the charterers or their agent; and the provision was, that the vessel was to be loaded and discharged, at the expense of the charterers, with the assistance of the crew.

The vessel arrived at Farmingdale, May 20, 1865, and the master immediately reported to the charterers that the vessel was ready to receive cargo.

It was admitted that the cargo was ultimately furnished, and loaded into the vessel, and that she safely transported and well and truly delivered the same at the port of destination and discharge.

The principal defence was, that the vessel did not seasonably arrive at Farmingdale; that in consequence, the charterers were obliged to employ another vessel in her stead, and that they did not load her under the charter-party described in the libel, but under a new contract made with the owners, in which it was agreed that they should load her at eight dollars, measurement or weight, as specified in the bill of lading, and that they had paid that amount to the owners of the vessel in full discharge of the contract. They admitted, that if the charter-party remained in full force, they were liable for the difference between the sum therein named, as charter-money, and the sum paid, as already mentioned.

In the District Court, a decree was entered in favor of the libellants, for the balance of the charter-money as provided in the charter-party.

*Howard and Cleaves*, for libellants.

*W. L. Putnam*, for respondents.

CLIFFORD, J. Appellants contend that they never became liable under the charter-party, because the proofs show, as they insist, that the owners of the vessel never fulfilled the stipulations of the charter-party on their part; that the delay of the vessel in arriving at the place of loading operated as a breach of the contract, and discharged them from all obligations to furnish her with a cargo for the voyage. The terms of the charter-party, properly construed, required the vessel, as a matter of legal implication, to sail from the anchorage where she lay within a

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reasonable time, and to proceed to the place of loading, without deviation, and with reasonable despatch, the dangers of the seas and navigation excepted.

The parties made no stipulation as to the day the vessel should sail, or as to the time to be allowed for the trip from Boston to Farmingdale, but the true rule of construction in such cases is, that the vessel shall sail within a reasonable time, and proceed with reasonable despatch and without unnecessary deviation to the place of loading, unless delayed by the public enemy or perils of the seas. Whether those qualifications to the obligation of reasonable despatch could be admitted as a matter of mere implication, it is not necessary in this case to determine, as the dangers of the seas and navigation are properly excepted in the charter-party, and there is no evidence in the record applicable to the other branch of the inquiry. The implied obligation of reasonable despatch in proceeding to the place of loading must be considered in connection with the express exception of the perils of the seas and navigation. Such an implied covenant in a charter-party is not a condition precedent, which if broken will justify the charterer in disregarding all his covenants and promises, unless the delay is so great that it deprives the charterer of the whole benefit of the contract, or entirely frustrates the object he had in view in chartering the vessel. Conditions precedent must be definite, and they are usually express, but it is unnecessary to determine whether they may not also be implied, as I am clearly of the opinion that the covenant of the charter-party in this case, as now construed, if expressed in the instrument, would not amount to a condition precedent within the principle laid down in any well-considered judicial decision, unless it appeared that the delay had the effect to frustrate the voyage. The strongest case construing the covenant of a charter-party as a condition precedent is that of *Lowber v. Bangs*, 2 Wall. 728; but it is obvious that the rule of construction there adopted falls far short of what would be required in this case, in order to give that effect to the implied covenant under consideration. The majority of the court held in that case that the covenant, "ship to proceed from Melbourne to Calcutta with all



possible despatch," was a condition precedent to the right of the ship-owner to recover. When the charter-party was executed, the ship was on her passage from New York to Melbourne, and the terms of the instrument expressly required the owners to use the most direct means to forward instructions to the master, ordering it to be fulfilled. Instructions were duly forwarded, but the ship arrived at Melbourne, discharged cargo, and sailed for Manilla before the mail arrived, and in consequence thereof, more than six months elapsed before the ship reached the place of loading. Instead of sailing direct to Calcutta, she went first to Manilla, and it was upon that ground that a majority of the court held that the owners had broken the contract. Decisions of a contrary character were referred to by the appellees, and a minority of the court were unable to agree to the conclusion. Since that time the question has again been considered in one of the English courts. *MacAndrew et al. v. Chapple et al.*, 1 Law Rep. C. P. 643.

The stipulation in that case was, that the steamer then just launched at Newcastle, and not quite fitted for sea, should, on being ready, proceed with all convenient speed to Alexandria, Egypt, and there receive a cargo of cotton, and thence proceed to London or Liverpool, as ordered on signing the bill of lading. The steamer deviated in the trip from Newcastle, and the charterers refused to furnish her with a cargo. The defence was, that the covenant to proceed to the place of loading with all convenient speed, was a condition precedent; that inasmuch as that covenant was broken by the owners, the charterers were discharged from all obligation to load the steamer; but the court unanimously decided that the phrase was only a stipulation, and not a condition precedent, and that the delay afforded no justification to the freighters for refusing to furnish a cargo, and that his remedy for the damage occasioned by the delay was by a cross-action. "Delay by deviation," said Willes, J., "is the same as delay in starting"; and he held it to be settled law that no delay or deviation which did not entirely frustrate the object the charterer had in view, was a sufficient answer to an action for not loading a cargo, but only gave a cross-action for damages.



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Neither the language of the charter-party, nor any proper implication from it, affords any support to the theory that the failure of the vessel to proceed with greater despatch to the place of loading was a breach of any condition precedent on the part of the ship-owners, which discharged the charterers from their obligation to load the vessel. The same conclusion must follow whether the correct rule be regarded as that advanced in the case of *Lowber v. Bangs*, or the one laid down in the more recent case decided in one of the courts of Westminster Hall.

The next suggestion of the appellants is, that the charter-party was not to attach at all, until the vessel arrived at the place of loading, and inasmuch as she did not proceed to that place with reasonable despatch, the alleged contract was never concluded. Support to that proposition is attempted to be derived from the stipulation that the charter should commence when the vessel was ready to load, and notice thereof was given by the master. Undoubtedly the voyage for the transportation of the cargo commenced at that time and place, and it was the commencement of the voyage for the computation of lay-days, but the contract became operative when the charter-party was executed and delivered. The obligation of the ship-owners to put the vessel in a sea-worthy condition, and cause her to sail for the place of loading within a reasonable time, commenced when the charter-party became operative, and continued in force till the covenants were fulfilled. Performance of that implied covenant was as much required by the charter-party as that notice of readiness of the vessel to receive cargo should be given on her arrival at the place of loading. Such notice could not properly be given before the vessel actually arrived, and the implied requirement was, that she should proceed there with reasonable despatch, the dangers of the seas and navigation excepted. Unavoidable delay arising from these causes would not discharge the charterers from their covenant to load the vessel, unless the delay was so great as to frustrate the voyage or deprive the freighter of the benefit of his contract. Where the delay ensues from unforeseen causes, but the voyage is not frustrated, the charterer is entitled to his claim for damages, as compensation for any injury

he may sustain. *Freeman v. Taylor*, 8 Bing. 124; *Clipsam v. Vertue*, 5 Ad. & El., N. S. 265; *Seeger v. Duthie*, 8 J. Scott, N. S. 45; *Tarrabochia v. Hickie*, 1 H. & N. 183; *Dimick v. Cortlett*, 12 Moore, P. C. 227.

The defence that a new charter-party or contract was made, is entirely unsupported by the evidence. When the master gave the required notice that the vessel was ready to receive cargo, the charterers refused to load her, and on the 26th of the same month they telegraphed to the owners that they would "load the vessel at going rates, no other terms, damages or not." The owner of the vessel replied on the same day that they, the charterers, must either load her per the charter-party or pay damages. Responsive to that telegram, the plaintiff answered to the effect, that they would load the vessel for that voyage "at eight dollars, measurement or weight, difference between old and new, charter open, to be settled by the courts or arbitration," without prejudicing the rights of the other party. The final reply of the defendants was as follows: "We accept your proposition; load vessel as per despatch of this date," which closed the telegraphic correspondence. Pursuant to that arrangement of the controversy, the defendants loaded the vessel, and she duly transported the cargo, and made right delivery of the same at the port of destination and discharge. Prompt payment was made of the sum mentioned as freight in the telegraphic correspondence at the place, and within the time originally contracted. The present suit is for the difference between that sum and that stipulated in the charter-party, which it was agreed might be settled by arbitration or by the courts. Unable to agree and unwilling to refer, the parties come here, and it is evident that their legal rights must be determined under the charter-party, as the facts were when the master reported the vessel to the charterers. They made no new charter-party, and it is clear that the controversy then was the same as it is at the present time. The arrangement was made that the vessel should be loaded, and it was agreed that the voyage should not prejudice either party, that is, that their rights should remain unaffected by those subsequent acts, but be determined just as they would be if the defendants

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had refused to furnish the cargo and employed another vessel for the voyage. In that view the defendants are clearly liable, unless they can show that the master, in failing to report the vessel within a reasonable time, violated some condition precedent in the charter-party, or that the delay was so great as to frustrate the voyage.

The explanations already made show that the first ground of defence fails, and it is equally clear that the second cannot be sustained. When the *Star of Hope* was reported as ready to receive cargo, it is true that the defendants had employed and loaded another vessel with the cargo of ice intended for the plaintiff's vessel, but on the arrival of the latter vessel they changed the destination of the former, and sent her to another port, in fulfilment of another contract, which they had with the government. But the evidence that the voyage was not frustrated is, that it was fully performed, and the uncontradicted testimony is, that the cargo was duly delivered to the consignees at the port of original destination, and received without any complaint. No particular notice is taken of the causes of delay, as it is agreed that they arose from the perils of the seas, and not from any negligence or wilful default of the master or owners. Suffice it to say that the vessel encountered rough weather in her trip from Boston to Farmingdale, and having sprung a leak before she reached Bath, she was obliged to put back to Portland for repairs. Competent persons were called to determine what repairs were necessary, and they were completed with reasonable despatch.

Decree affirmed, with costs.

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APRIL TERM, 1868.

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LEWIS AUDENREID v. JOHN T. RANDALL *et als.*

It is a general principle that if parties have contracted to sell and buy a specific article of personal property, of which weight, price, measure, and fitness are definitely prescribed, or if the terms of the contract provide suitable means by which those qualities, or conditions may be ascertained, and the articles are in the state, for which the parties contracted, the property passes *eo instanti*, by virtue of the contract, without delivery.

Where the terms of an executory contract of sale are agreed, and everything the seller has to do is complete, the buyer is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said as to the time of delivery or payment.

If the goods are sold on credit, and the contract silent as to time of delivery, the vendee is entitled to immediate possession, and the right of property vests at once in the buyer, subject to the vendor's right of stoppage *in transitu*, if exercised before possession by the buyer.

As between parties, when the contract is complete, the property vests in the buyer; as to every one except the vendor, delivery of possession is necessary to every valid conveyance of personal property.

Where actual delivery is impracticable or impossible, symbolical delivery will be equivalent in its legal effect.

Mere words, however, in case of the impracticability of actual delivery, will not suffice to constitute delivery and acceptance of goods. Added to the language of the contract, there must be some act of the parties tantamount to a transfer and acceptance, as where by some act dominion over the goods is relinquished by the vendor, and they are put in the power of the vendee.

As against subsequent purchasers or judgment creditors, delivery is necessary, but where actual manual occupation is impossible, from the character or situation of the goods, it cannot be admitted that no legal delivery can be made.

Under such circumstances valid sale is sufficient to take the case out of the operation of the Statute of Frauds if it appear that the title becomes absolute in the buyer discharged of all liens of the vendor.

The right of stoppage *in transitu* attaches to goods sold on credit, where nothing is agreed as to time of delivery. Then the vendee is immediately entitled to the property and the right of possession, but the latter is not absolute, being liable to be defeated if he becomes insolvent before he obtains absolute control.

Where there has been a sale by the consignee, which would, independently of the indorsement of the bill of lading, as against the consignor, give title to the vendee, the effect of the indorsement would be to take away the right of stoppage *in transitu*, in cases where otherwise it would exist.

Parties in Philadelphia consigned a cargo of coal to parties residing in Boston, to be delivered at Portland, and the consignees named in the bill of lading indorsed and delivered the same to the defendants, at their request, at a certain price per ton for the coal, with

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the right in the plaintiffs to draw for the amount at any time. *Held*, the terms of the sale were absolute, as also was the indorsement and delivery of the bill of lading, and defeated the right of stoppage *in transitu*, as against the purchaser.

It would make no difference in this case, if the consignees named in the bill of lading were only agents of the shippers of the coal, because two days after the arrival of the vessel, and after the master notified the defendants that he was ready to deliver, the plaintiff approved the sale, and insisted that defendants were bound by the contract.

It makes no difference in such case whether the consignee be the buyer of the goods or a factor. His transfer is equally capable of divesting the property of the owner, and vesting it in the indorsee of the bill of lading.

Where there is no actual delivery, a sale of goods may be valid at common law, and the contract be within the Statute of Frauds ; but if there be a delivery, though symbolical, sufficient to transfer the property even as against the creditors of the seller and subsequent purchasers, and to the exclusion of the right of stoppage *in transitu*, there need not be anything more than would be sufficient to constitute a delivery, and to change the property at common law.

Mere delivery of a bill of lading is not enough, without a distinct acceptance of the same by the purchaser, but anything which was intended to be so, and received as such, which actually puts the goods within the reach and power of the buyer; and among the instances of such delivery cited by legal writers, is that of the indorsement of a bill of lading.

This case is wholly different from that of the holder of an ordinary order, as the consignee of a bill of lading has such a property that he can assign it over, and acceptance in such a case is acceptance of the goods, takes the case out of the operation of the Statute of Frauds, and vests the absolute dominion of the goods in the buyer. If it were otherwise, still in this case, the plaintiff would be entitled to judgment, because the delivery of the bill of lading and the bill of coal were made at the date of the contract, and the defendants subsequently offered to pay the plaintiffs a certain sum per ton to take back the goods, and release them from the contract, after which the defendants still retained the bill of lading and the bill of goods.

SPECIAL assumpsit, together with the common counts for goods sold and delivered, and for money had and received.

The substantial charge of the special counts was, that the plaintiff at the request of the defendants, on the 16th of March, 1865, bargained and sold to the defendants a certain quantity of coal called Broad Top Coal, being the cargo of the brig Russian, then on her voyage from Philadelphia to Portland, as per bill of lading of the 30th of the same month, amounting to 289 tons, and that the defendants subsequently, when the vessel arrived with the coal on board, refused to receive it and pay for the same, as they had agreed to do.

The contract price of the coal was \$11.50 per ton, and the freight \$6.50 per ton.

The plea was the general issue, but the parties, after the evi-

dence was introduced on both sides, withdrew the case from the jury by consent, and submitted the same to the court, under the act of Congress in such case made and provided. Most of the material facts were undisputed, and they may be stated in a very few words.

Plaintiff was a merchant doing business in Boston, and the defendants were citizens of Maine doing business in Portland. Wanting to purchase coal, the defendants, on the 16th of March, 1865, called on the plaintiff at his place of business, and inquired if he, the plaintiff, had any soft coal on the way from Philadelphia, or, if not, whether he would not ship them a cargo of such coal; and being told that the plaintiff had just received a bill of lading for a shipment of such a cargo, bound to Portland, the defendants inquired if it was for sale, and if so, at what price the plaintiff would sell the coal.

The price asked was \$12 per ton for the coal, and the freight was \$6.50 per ton; but, as finally agreed, the price including freight was \$18.

Defendants agreed to purchase at that price, and the consignees — named in the bill of lading, A. C. Morse & Co. — indorsed and delivered to the defendants the bill of lading, which was introduced as evidence by the plaintiff. The bill of lading bore date on the 13th of March, 1865, and appeared to have been duly executed at Philadelphia on that day; and the bill of coal given by the plaintiff bore the same date, but the proof showed that it was written and delivered at Boston at the time the bill of lading was indorsed and delivered by the consignees, and that it was a part of that transaction.

Payment was to be made in cash, and the plaintiff proved that he had a right to draw for the amount at any time.

Freights immediately declined, and the agent of the plaintiff, one of the consignees, about a week after the indorsement and delivery of the bill of lading, being in Portland where the defendants resided, they requested him to sell the cargo to some other party, and offered to give him one dollar per ton if he would take the coal off their hands; the reason assigned for the request by the defendants was, that they should make a loss if they took

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the coal, but the agent of the plaintiff declined to accept the proposition.

The proofs also showed that the vessel arrived at Portland, March 29, 1865, with the coal on board, in good condition, and that the master notified the plaintiff by telegraph of her arrival, and that the defendants refused to receive the coal. On the last day of March, one of the defendants called at the plaintiff's place of business and informed him, or one of the consignees, that the vessel had arrived, and requested him to come to Portland and take care of the coal or to sell it, and at the same time stated that if the plaintiff would do so, they would bear a part of the loss, and that they would make up the residue in other purchases of him in the course of the year.

The plaintiff refused the proposition, and the defendants informed him that they, the defendants, would have nothing to do with the coal. The response of the plaintiff to that suggestion was, that if the defendants refused to receive the coal, he would sell it on their account, and charge them the difference. He also wrote them to that effect on the same day, in consequence of a telegram from the master that the defendants still refused to receive the coal. Some other correspondence between the parties was also introduced in evidence, but it contained nothing which is very material. The letter of the plaintiff to the defendants, dated March 31, of the same year, showed that they received the telegram from the master; and a telegram from the defendants to the plaintiff, dated the 1st of April following, showed that the defendants on that day enclosed to the plaintiff the bill of lading of the cargo, and the bill of the coal which they received at the time the contract was made. The defendants refused to receive the coal, and thereupon the plaintiff advertised and sold the coal at public auction.

*Davis and Drummond*, for plaintiff.

*Rand and Rand*, for defendants.

The course of the arguments is sufficiently indicated in the opinion.

CLIFFORD, J. The principal defence is, that the contract was within the Statute of Frauds, and void. The contract was made



in Massachusetts, and the statute there provides that no contract for the sale of goods, wares, or merchandise for the price of \$50 or more shall be good or valid until the purchaser accepts or receives part of the goods so sold, or gives something in earnest, to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain is made and signed by the party to be charged thereby, or by some person by him thereunto lawfully authorized. Gen. Stat. 327.

Where the statute does not apply, it may be laid down as a well-settled general principle, that if the parties have agreed, one to buy and the other to sell specific articles of personal property, of which the price, weight, measure, and requisite fitness are definitely prescribed, or if the terms of the contract provide suitable means by which those qualities or conditions may be ascertained, and the articles which are the subject of the negotiation are in the State for which the parties contracted, the property passes *eo instanti*, by virtue of the contract of sale, and without delivery. Repeated decisions have affirmed the rule, that when the terms of sale are agreed between the parties, and everything the seller has to do with the goods is complete, the contract of sale becomes absolute, as between the parties, without actual payment of the price or delivery of the articles, and the property and the risk of accident to the goods vest in the buyer, subject to certain qualifications. He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery or the time of payment. But if the goods are sold upon credit, and the terms of the contract are silent as to the time of delivery, the vendee is entitled to the immediate possession, and the right of property vests at once in the buyer, subject to the seller's right of estoppel *in transitu*, if exercised before the former actually obtains possession. *Leonard et al v. Davis et al.*, 1 Black, 483; *Tome v. Dubois*, 6 Wall. 548; 2 Kent Com. (11th ed.) 658; *Hinde v. Whitehouse*, 7 East, 571; *Homes et al. v. Crane*, 2 Pick. 607; *De Wolf v. Harris*, 4 Mass. 515; *Grosvenor et al. v. Phillips*, 2 Hill, 147.

Executory contracts only are the subject of remark on the present occasion, as it is clear that when the contract has been in



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fact fully performed, the rights, duties, and obligations of the parties resulting from such performance stand unaffected by the statute. *Stone v. Dennison*, 13 Pick. 4; *Brown on Stat. of Frauds*, § 116, p. 118.

Although it is true, as between the parties, that the property vests in the buyer without delivery, when the bargain is complete, and everything is done by the seller which the terms of the contract prescribed, yet it is equally true, as is perfectly well established, that as against every one, except the vendor, a delivery of possession is necessary in every valid conveyance of personal property. *Lanfear v. Sumner*, 17 Mass. 110; *Caldwell v. Ball*, 1 Term, 205.

Actual delivery, however, is often impracticable from the cumbersome nature of the article, and sometimes impossible on account of the situation, or because not present, as in the case of goods or ships at sea. Symbolical delivery will in such cases be sufficient, and equivalent, in its legal effect, to actual delivery without the actual manual occupation by the purchasers. *Leonard et al. v. Davis et al.*, 1 Black, 482; 2 Kent Com. (11th ed.) 671; *Frostburg M. Company v. N. E. Glass Company*, 9 Cush. 118.

Delivery of the key of the warehouse in which goods sold are deposited, or transferring them on the books of the warehouseman or wharfinger to the name of the buyer, is in general sufficient to transfer the property, under the terms of a proper contract to that effect. *Chaplin v. Rogers*, 1 East, 194; *Dodsley v. Varley*, 12 Ad. & Ell. 632.

So the delivery of the receipt of the storekeeper for the goods, being the documentary evidence of the title, has been held to be a constructive delivery of the goods. *Wilkes et al. v. Ferris*, 5 Johns. 335.

Timber, logs, or other lumber floating in the water, are only in the constructive possession of the owner, and under such circumstances only a symbolical delivery in case of sale is all that can be expected, and is amply sufficient to pass the title, as between the parties. *Ludwig v. Fuller*, 17 Me. 162; *Boynton v. Veazie*, 24 Me. 288; *Macomber et al. v. Parker*, 13 Pick. 175.

Mere words, however, even in the case of cumbersome articles,

are not sufficient to constitute a delivery and acceptance of goods, such as the statute requires. Superadded to the language of the contract, there must be some act of the parties amounting to a transfer of the possession, and an acceptance thereof by the buyer, as where the seller does some act whereby he relinquishes dominion over the property, and puts it in the power of the buyer. *Shindler v. Houston*, 1 Comst. 266.

Examples put in that case as illustrations are, where the key of the warehouse was delivered to the buyer, and where the bailee of the goods was directed to deliver them according to the contract. Words only do not constitute an actual or symbolical delivery within the meaning of the Statute of Frauds. The extent of the rule as there laid down is, that there must be some act of the parties superadded to the language of the contract, which amounts to a transfer of the possession of the goods ; but the court do not deny that a valid delivery may be made symbolically, in cases where an actual delivery is impossible or impracticable. Undoubtedly a delivery is necessary to give validity to a sale, as against subsequent purchasers or judgment creditors ; but it cannot be admitted that in cases where an actual manual occupation of the articles is impossible, as in case of goods or ships at sea, or in case of cumbrous articles, no legal delivery can be made. Such a delivery is legal and sufficient to pass the title, when made in the usual manner, and by the usual symbol, fitted to prevent fraud, and give certainty to the transaction. Valid sale of personal property, as against subsequent purchasers and judgment creditors, is sufficient to take the case out of the operation of the Statute of Frauds, if it appears that the title becomes absolute in the buyer, and discharged of all liens on the part of the seller. When goods are sold at sea, the indorsement and delivery of the bill of lading to the buyer, and the acceptance of the same by him under the contract, are the proper substitutes for an actual delivery and acceptance of the goods, and have the effect to vest a perfect title in the buyer, discharged of all right of stoppage *in transitu*, on the part of the seller and indorser of the bill of lading. *Newsom v. Thornton*, 6 East, 41 ; *Pratt v. Parkman*, 24 Pick. 42.

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The right of stoppage *in transitu* was conceded to the seller, in order to prevent the injustice which would take place, if in consequence of the vendee's insolvency, while the price of the goods was yet unpaid, they were to be seized and appropriated in satisfaction of his other liabilities, to the prejudice of the rights of his unpaid vendor. The vendor's right in respect of his price is not a mere lien, which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. Such a right attaches to goods sold on credit, where nothing is agreed on as to the time of delivery. In that state of the case, the vendee is immediately entitled to the possession, and the property and the right of possession vests at once in him; but his right of possession is not absolute, because it is liable to be defeated, if he becomes insolvent before he obtains the absolute control of the goods. *Bloxam v. Sanders*, 4 B. & C. 948; *Tooke v. Hollingworth*, 5 Term, 215.

Goods may be stopped *in transitu* so long as the transit continues, whether by land or water, from the consignor to the consignee, and whether they are in the hands of the carrier, warehousekeeper, wharfinger, or any other individual connected with the transportation; but the right of stoppage ceases when the goods have reached the place of destination, and have come to the actual or constructive possession of the consignee. *Covell v. Hitchcock*, 23 Wend. 613; *Mottram v. Heyer*, 1 Den. 487; Smith's Mer. Law, 683.

Possession actual or constructive defeats the right of stoppage *in transitu*, and the bill of lading becomes *functus officio* as soon as the goods are landed and warehoused in the name of the holder, as he then becomes possessed of the goods themselves in the eye of the law, and derives his power, not from the bill of lading, but from such possession. Nothing can be more certain than the rule that, as between the consignor and the consignee on the one side, and third parties on the other, the indorsement and delivery of the bill of lading by the consignee of goods at sea, and the acceptance of the same by the buyer under a contract, made in good faith, defeats the right of stoppage *in transitu* by the consignor. The settled rule is, that in such

cases, where there has been a sale by the consignee which would give a title to the vendee, as against the consignor independently of the indorsement of the bill of lading, the effect of the indorsement would be to take away that right even in cases where it would otherwise exist. *Gurney v. Behrend*, 3 Ell. & Bl. 622; *Pennel et al. v. Alexander et al.*, 3 Ell. & Bl. 282.

Regarded as consignees, therefore, it is clear that the plaintiffs never had any right of stoppage *in transitu*, as the terms of the sale were absolute, and the indorsement and delivery of the bill of lading by Morse & Co. were absolute and unconditional. The suggestion may be made that Morse & Co. were only agents of the plaintiffs, and that the latter were in fact the shippers and owners of the coal. Suppose that to be so, and suppose that they are not estopped to deny that the bill of lading expresses their true relation to the goods, still it can make no difference in this case, as the vessel had arrived, and the master had notified the defendants that he was ready to deliver the cargo, and the plaintiffs, two days after, affirmed the sale, and insisted that the defendants were bound by the contract. *Rowley et al. v. Bigelow et al.*, 12 Pick. 307; *Craven et al. v. Ryder*, 6 Taunt. 433.

Bad faith is not imputed in that case, and the Supreme Court, speaking to the precise point under consideration, say that, by the well-settled principles of commercial law, the consignee in the bill of lading is constituted the authorized agent of the owner, whoever he may be, to receive the goods, and by his indorsement of the bill of lading to a *bona fide* purchaser, for a valuable consideration, without notice of any adverse interest, the latter becomes, as against all the world, the owner of the goods. It matters not whether the consignee in such a case be the buyer of the goods or the factor or agent of the owner. His transfer in such a case is equally capable of divesting the property of the owner and vesting it in the indorsee of the bill of lading. *Conard v. Atlantic Insurance Company*, 1 Pet. 445.

The same court held in *Gibson v. Stevens*, 8 How. 399, that where personal property is, from its character or situation at the time of the sale, incapable of actual delivery, the delivery of the bill of sale or other muniments of title is sufficient to transfer

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the property and possession to the vendee. Transactions of that character, say the court, if in the usual course of trade, and free from all suspicion of bad faith, have the effect to transfer the legal title and constructive possession of the property to the purchaser ; and the court expressly affirms the doctrine that, ships at sea may be transferred to a purchaser by the delivery of a bill of sale, and that goods at sea may be transferred by the indorsement and delivery of the bill of lading. Taney, C. J., adds, that it is hardly necessary to refer to adjudged cases to prove a doctrine so familiar in the courts. *Grove v. Brien et al.*, 8 How. 436.

Actual delivery is a manual transfer of the commodity sold to the vendee, and operates to transfer the title in all cases, unless it be made upon a condition which prevents such a consequence. So a delivery to a common carrier in the usual course of business, is a sufficient delivery to the vendee, but the right of stoppage *in transitu* remains in the vendor. *Stanton et al. v. Eager*, 16 Pick. 467.

But the *bona fide* transferee, for value, of a bill of lading indorsed by the consignee of the shipper, takes an absolute title to the goods, free from the equitable right of the unpaid vendor to stop the goods *in transitu*, as against the purchaser. The obvious reason of the rule is, that by reason of such a transfer of the bill of lading the *transitu* is regarded as ended, and the right of stoppage therefore is gone. See Story on Sales, 214, 244 ; *Dows v. Greene*, 24 N. Y. 641 ; *Dows v. Perrin*, 16 N. Y. 325 ; *Gurney v. Behrend*, 3 Ell. & Bl. 622 – 637.

The views of Mr. Brown are, that in order to work an acceptance and receipt of goods purchased, it is not necessary that there should be an actual manual possession of them by the buyer, and he affirms that the statute requires no other act of acceptance and receipt than such as are consistent with the nature, locality, and condition of the goods. The substance of his proposition is, that the statute will be satisfied with symbolical acceptance and receipt of the goods when the case admits of no other delivery, and he expressly states that, in case of a ship or cargo at sea, the delivery and acceptance of the bill of sale or the

bill of lading will suffice to perfect the transfer. Browne on Stat. of Frauds, 318; *Badlam v. Tucker*, 1 Pick. 389; *Gardner v. Howland*, 2 Pick. 599; *Brinley v. Spring*, 7 Greenl. 241.

Acceptance and receipt of inaccessible and ponderous or bulky articles may be legally accomplished, in the view of that commentator, by the performance of any act which shows that the seller has parted with the right and claim to control the property, and that the purchaser has acquired that right. *Boynton v. Veazie*, 24 Me. 288; *Bailey v. Ogden*, 3 Johns. 420; *Edan v. Dudfield*, 1 Ad. & Ell. N. S. 302.

The proposition of the defendants is, where manual possession of the goods is not taken by the buyer, there must be something more than would be sufficient to constitute a delivery and to change the property at common law; and if by that it is only meant that a sale may be valid at common law, as between the parties, and the contract still be within the Statute of Frauds, the proposition may well be admitted. Subject to that qualification, the proposition is doubtless correct in cases where there is no actual delivery; but if the proposition is understood to include sales by parol contract where there is a delivery, though symbolical, yet sufficient to transfer the property, not only as between the parties, but against the creditors of the seller and subsequent purchasers, and to the exclusion of the right of stoppage *in transitu*, then the correctness of the proposition cannot be admitted. Possession as matter of law is not in abeyance; it is somewhere, and if not in the seller, it must, in contemplation of law, be in the buyer, and if so, it is clear that the case is not within the Statute of Frauds. Recent English decisions, it is contended by the defendants, assert a different doctrine, but the cases cited, upon careful scrutiny, do not appear to support any such conclusion. Take, for example, the case of *Meredith v. Meigh*, 2 Ell. & Bl. 365, which is the first of the cases referred to as maintaining the proposition. The statement of the case shows that the defendants, at Handley, on the 12th of April, 1850, verbally ordered from the agent of the plaintiff a cargo of china-stone clay, requesting the agent to send it by sea, consigned to certain public carriers at Liverpool, for the defendants, and to

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be insured by the plaintiff on their account. Plaintiffs resided at Cornwall, and the ordinary mode of transportation was by sea to the Mersey, and thence by inland navigation. Both parties knew that the company named as carriers were engaged in transporting goods from the Mersey to the defendants' place of business. Pursuant to the order, the cargo was sent by a vessel selected by the plaintiff, and on the 18th of April an unsigned copy of the bill of lading was forwarded to the inland carriers, with directions that when they received the bill of lading they should forward the cargo.

The shipment was completed the 22d of April, and the bill of lading, duly signed, was sent as directed in the order. On that day the vessel sailed, and on the 26th of the same month she was lost. Notice of shipment was given to the defendants, but they remained silent, and there was no evidence that they ever saw the bill of lading. *Held*, that a delivery to the master of the vessel selected by the plaintiff was not a delivery to the defendants; and that the silence of the defendants did not alter their situation, as there was nothing in the circumstances which required them to take any action in the premises. Some of the judges thought that the case might have been different if the bill of lading had been received by the defendants themselves, and especially if they had dealt with it, or had in any respect acted as the owners of the goods. Erle, J., said: "I have no doubt that the bill of lading, which is the symbol of property, may be so received and dealt with as to be equivalent to an actual receipt of the property itself; and the Court of Queen's Bench, in the case of *Currie v. Anderson*, 2 E. & E. 593, subsequently so held, although the bill of lading was made out in the name of the plaintiffs. Adjudged cases may be found which seem to imply that there cannot be such an acceptance and receipt of the goods by the buyer as will take the case out of the Statute of Frauds, unless he has examined the goods, or done something to preclude him from contending that they do not correspond with the contract, but the converse of that proposition is now well-settled law. *Morton v. Tibbet*, 15 Ad. & Ell. N. S. 428; *Parker v. Wallis et al.*, 37 Eng. L. & Eq. 26; *Fitzhugh v. Williams*, 5 Seld. 565.



The next case cited by the defendants is that of *Bill v. Bament*, 9 Mees. & W. 36, which is a case where the sale was for ready money, in which the plaintiff was not bound to deliver until the payment of the price; and inasmuch as there had been no delivery, the court held that there was no evidence to go to the jury to satisfy the Statute of Frauds.

Reference is also made to the case of *Norman v. Phillips*, 14 Mees. & W. 278, which was a verbal order for timber, directing it to be sent to a railway station, and forwarded to a described place, as had been the practice between the parties in previous dealings. The timber was sent, and arrived at the place of destination, but the defendant, when notified of its arrival, refused to take it. When it arrived it was unaccompanied by any invoice, but one was sent in a few days, which was received by the defendant, and he kept it for a period exceeding a month, and then informed the plaintiff that he declined taking the timber. The verdict was for the plaintiff. A rule to set it aside, and enter a nonsuit was granted, which was made absolute, as the evidence was not sufficient to warrant a verdict. Reliance is also placed upon the case of *Farina v. Home*, 16 Mees. & W. 119, although its application is not apparent. Plaintiff shipped goods upon the verbal order of the defendant to his own agent, who stored them, and indorsed the warehouseman's receipt to the defendant, who kept it for some months, but denied that he had ordered the goods, and refused to pay the charges on them. *Held*, that there was no delivery, the warehouseman's possession being considered to be that of the consignee, notwithstanding the indorsement of the receipt, until the warehouseman attorned to the vendee.

Comment need not be made upon adjudged cases where it appears that the goods remained in the possession of the vendor, as it is evident that they do not support the proposition of the defendants in this case. *Castle et al. v. Swoorder*, 5 Hurls. & Nor. 281.

Certain other cases are also referred to, which decide that a delivery of goods ordered to a carrier, without more, is not such a delivery to the buyer as will take the contract out of the operation of the Statute of Frauds, which is doubtless correct, as in that state of the case there is no acceptance of the goods, actual or symbolical,



and they are still subject to the right of stoppage *in transitu* by the seller, and every objection as to quality or quantity by the buyer. *Coombs v. B. & E. Railroad Company*, 3 Hurls. & Nor. 510; *Outwater v. Dodge*, 6 Wend. 400; *Howard v. Borden*, 13 Allen, 300.

Decided cases, where it appears not only that the defendant did not accept the goods sent under an order, but that he refused to do so, need no comment; and if it appears that he merely examined the goods to ascertain their quality or quantity, it cannot make any difference, as in such case there is no evidence of acceptance. *Kent v. Hurlshington*, 3 B. & P. 232.

When goods are in custody of a third person, an order for delivery with notice to that person is sufficient to pass the property, even as against the attaching creditors of the vendor. *Tuxworth v. Moore*, 9 Pick. 347; *Carter v. Willard*, 19 Pick. 1; *Burge v. Cone*, 6 Allen, 412; *Boardman v. Spooner et als.*, 13 Allen, 357; *Whitaker v. Sumner*, 20 Pick. 405.

Assent by the party, however, in whose custody the goods are, it is said, is necessary to constitute acceptance and receipt under the Statute of Frauds; but if the parties agree that he shall, as between them, be considered the bailee of the buyer, it is not perceived how the acts of the bailee can defeat the sale. *Bentall et al. v. Burn*, 3 B. & C. 423; *Farina v. Home*, 16 Mees. & W. 119.

Text-writers agree that a mere delivery of a bill of lading is not enough without a distinct acceptance of the same by the purchaser; but anything amounts to a delivery and acceptance, says Parsons, which was intended to be so, and received as such, and which actually put the goods within the reach and power of the buyer; and, among the cases enumerated by the author, where symbolical delivery is sufficient, is that of the indorsement and delivery of a bill of lading. Pars. Mer. Law, 75. Most recent text-writers in England also maintain the same views, and there is no decision to the contrary. McLachl. on Ship. 341; M. & P. on Ship. 143; Chitty on C. & M. 403; *Lickbarrow v. Mason*, 6 East, 20.

The argument of the defendants is, that there is no difference between the case at bar and an ordinary order; but it is not pos-

sible to adopt that suggestion, as a different rule prevailed for a century before the Revolution. "The consignee of a bill of lading," said Holt, C. J., "has such a property that he may assign it over." *Evans v. Marlett*, 1 Ld. Raym. 271.

If the goods are *bona fide* sold by the factor at sea (as they may be, where no delivery can be made), the sale, said Lord Mansfield, will be good, and the vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered. *Wright et al. v. Campbell et al.*, 4 Burr. 2046; *Davis et al. v. Bradley et al.*, 28 Vt. 121.

Indorsement and delivery of a bill of lading passes no title if the instrument was stolen, or if the consignor was not the owner of the goods; but if the assignment was *bona fide* at the transfer, delivery and acceptance of this symbol will transfer everything which it represents. *Newsom et al. v. Thornton et al.*, 6 East, 19.

Acceptance in such a case is the acceptance of the goods, and has the effect to take the case out of the operation of the Statute of Frauds, and vests the absolute dominion of the goods in the buyer, and the right of stoppage *in transitu* ceases from that moment. *Dows v. Greene*, 24 N. Y. 642.

Even suppose it were otherwise, still the plaintiff would be entitled to judgment in this case, in view of the special circumstances set forth in the statement. Delivery of the bill of lading, together with the bill of the coal, was made at the date of the contract. The subsequent conduct of the defendants clearly shows that they regarded the transfer of the property as complete, as they offered to pay the plaintiff one dollar per ton to take it back, and release them from the contract. Although the plaintiff refused to do as requested, still the defendants retained the bill of lading and the bill of parcels, without any intimation that they should not receive the cargo. They substantially repeated the request after the vessel arrived, and the same being again refused, they still retained the instruments of title, until the 1st of April, when they were returned as described in the statement. Due notice was given of the time of the sale of the cargo, and it was properly sold, as is required in such cases.

Plaintiff is entitled to judgment.

## NEW HAMPSHIRE DISTRICT.

MAY TERM, 1868.

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NATHANIEL A. DANIELS *et al.* v. MICHAEL MCCABE.

Where goods were sold, and the contract and account of sale and delivery completed in a State where a sale of that description of merchandise was prohibited by statute, the vendor is not entitled to recover the contract price, although he holds a license for the sale of such goods under the Internal Revenue Act of the United States, and although the internal-revenue tax upon such goods had also been paid.

ASSUMPSIT for goods sold and delivered. Facts agreed.

Plaintiffs were citizens of Massachusetts, and the defendant a citizen of New Hampshire.

The agreed statement showed that the amount claimed was for liquors sold, which were not imported. They were sold by the plaintiffs at their store in Boston, in December, 1863, and by them delivered to the defendant at the depot of the Boston and Maine Railroad in that city. At the time of the sale the plaintiffs were licensed as wholesale and retail dealers in liquors, under the internal-revenue law of the United States, and said liquors had paid an internal-revenue tax prior to the sale. Although licensed under the internal-revenue law of the United States, the plaintiffs, at the time of the sale, had no license to sell the liquor, under the law of the State. Sections twenty-eight, thirty, and sixty-one of chapter eighty-six of the General Statutes of Massachusetts were made a part of the case.

*Hackett* and *Smith*, for plaintiffs, cited *Sartwell v. Hughes*, 1 Cur. 244; *Holman v. Johnson*, Cowp. 341; *Hodgson v. Temple*, 5 Taunt. 181; *Langton v. Hughes*, 1 M. & S. 593; *Cope v. Rowlands*, 2 M. & W. 149; *Cannan v. Bryce*, 3 B. & Al. 179; *Harris v. Runnels*, 12 How. 79.

This action is not founded upon any cause of action enumerated in the Massachusetts General Statutes, section sixty-one,

upon which it is there provided no action shall be maintained. This provision is not only to be construed strictly, but by implication any instrument or contract not enumerated therein may be a good cause of action.

*I. A. Eastman*, for defendant.

The statute of Massachusetts, sections twenty-eight to thirty, which make a part of this case, impose a penalty for the sale of liquors. Such penalty implies a prohibition of the act of sale, and the price cannot be recovered. *Lewis v. Welch*, 14 N. H. 294; *Carlton v. Bailey*, 27 N. H. 230.

Section sixty-one, Massachusetts General Statutes, prohibits recovery. The fact that the liquors had paid a revenue tax does not impair the force of the Massachusetts statute, for the Internal Revenue Act expressly provides that the laws of the States in regard to such sales shall not be affected by the Revenue Act.

CLIFFORD, J. The substantial finding of the case is, that the liquors were sold at the store of the plaintiffs in Boston, and were by them delivered to the defendant at the depot of the railroad named in that city, so that it clearly appears that the contract was made and the sale completed in the State where the plaintiffs reside. Actual delivery of the liquors to the defendant at that place must be understood as found by the statement of facts. Such is the clear import of the statement; but if it be considered as a delivery to a carrier for the defendant, it was equally valid, as between the parties, and the same conclusion must follow. *Orcutt v. Nelson*, 1 Gray, 542.

“Delivery to a common carrier,” says Shaw, C. J., in that case, “completes the contract of sale, vests the property in the vendee, and consequently the goods, during the transit, are at the risk of the vendee.” Section twenty-eight prohibits the manufacture for sale, and the selling of spirituous and intoxicating liquors, or any mixed liquor, part of which is spirituous or intoxicating, unless the party doing any of those acts is authorized, as provided in that chapter, p. 442. The penalty prescribed by the thirtieth section of the act is ten dollars, and imprisonment in the house of correction not less than twenty nor more than thirty days for the first offence, which is increased for subsequent

violations. All payments or compensations for spirituous or intoxicating liquors sold in violation of law, whether in money, labor, or personal property, are declared by the sixty-first section to have been received without consideration, and against equity, law, and good conscience. Page 448. These several sections are, by the agreed statement, made a part of the case. The settled law in Massachusetts is, that no action can be maintained to enforce an executory contract for the price of liquors sold and delivered. Adjudged cases to that effect, in the reported decisions of the highest court of that State, are quite numerous.

Consignors of spirituous liquors, it is held, cannot maintain an action against their consignees, for the breach of an agreement to render an account of sales, pay the value of the liquors sold, and return the residue. *King v. McEvoy*, 4 Allen, 110.

The express rule also, as laid down by that court is, that no action lies to recover the proceeds of spirituous liquors sold in violation of law, by one to whom they had been intrusted, for the purpose of being sold by the owner. Justification for such a principle, which refuses damages for a breach of trust, can only be found in some positive rule of law, denying any power in the court to grant relief. *Galligan v. Fannan*, 7 Allen, 255.

Damages cannot be recovered for a breach of warranty in the sale of a horse, where it appears that the price of the horse is to be paid in liquors, which the purchaser cannot legally sell. *Howard v. Harris*, 8 Allen, 297 ; *Baker v. Collins*, 9 Allen, 253.

Taken together, it would seem that these decisions are sufficient to show what the rule upon the subject is ; but the highest court of that State has formally decided that no action will lie against a surety upon a promissory note, given in part for the price of cider sold for a beverage, within that State. *Nourse v. Pope*, 13 Allen, 87.

Neither authority nor argument is necessary to show that these decisions of the State court furnish the rule of decision in this case, as the proposition is universally acknowledged. Such is the rule upon general principles, but it is expressly made so by the thirty-fourth section of the Judiciary Act. 1 Stat. at Large, 92.

Payment of a license fee or tax, or both, to the United States,

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under the internal-revenue laws passed by Congress, does not authorize the sale of intoxicating liquors, in violation of the laws of a State. *Commonwealth v. Holbrook*, 10 Allen, 200.

Discussion of that question, however, is now unnecessary, as it is now authoritatively settled by the decision of the Supreme Court. *Pervear v. Commonwealth*, 5 Wall. 475.

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## MASSACHUSETTS DISTRICT.

MAY TERM, 1868.

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HIRAM V. LANE, Libellant and Appellee, v. THE SCHOONER A.  
DENIKE, JOHN E. JONES, Claimant.

A schooner in the evening, close hauled, on the port tack, was heading north by west, with the wind west-northwest. A brig on the starboard tack, with the wind at least two points free, was heading south by west half west. Both vessels were in a sea-worthy condition in all respects, and had sufficient lights, and both vessels had lookouts. The speed of the schooner was five or six knots, and that of the brig four or four and one half. When the vessels were at least one hundred and fifty yards apart, the brig ported her helm. Inevitable accident was not set up, and it was *held* not to be a case coming within the eleventh sailing rule.

The pilot on the schooner was notified by the lookout that there was a light ahead, upon which he went forward and looked at it for several minutes, and then went aft. It was not pretended that the approaching vessel would have passed to leeward by more than her length. *Held*, that he was negligent in not continuing to watch the approaching vessel.

It is not an excuse for the pilot of the schooner that he had a right to keep his course, under the rules of navigation.

Nothing in the rules of navigation can exonerate from the consequences of neglect of precautions such as are required by the ordinary practice of seamen, or the special circumstances of a case.

A party who negligently casts himself upon an obstruction is not entitled to damages, and the party who inflicts an injury cannot be allowed to defend himself upon the ground that the injured party committed the first error, if the person so committing the act causing the damage had reasonable notice of the error of the other, and means and adequate opportunity to have avoided the disaster.

The lookout on the schooner in this case had informed the pilot of the light ahead, saw

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the brig both before and when her helm was ported, and she attempted to cross the schooner's course. Instead of going aft, the pilot should have observed the necessity for precaution, and also watched the approaching vessel longer, in order to have obtained the same knowledge as the lookout. He could then have ported the schooner's helm in season to have avoided the collision.

Vigilance is required from those having the conduct of both vessels, when the circumstances of their approach require caution.

In this case it was *held* that there was negligence on both sides, and that the damages should be divided.

**ADMIRALTY** appeal. The cause of action was a collision on the high seas, and the defence was, that the disaster was occasioned by the mismanagement and negligence of those in charge of the libellant's vessel. The respondent filed a cross-libel. Most of the material allegations in the libel were denied in the answer, and the testimony in respect to the circumstances attending the collision was very conflicting. Libellant's vessel, the brig Clara F. Webster, was bound on a voyage from Rockland, in the State of Maine, to Philadelphia, in the State of Pennsylvania, with a full cargo of granite. The voyage of the respondent's vessel, the schooner A. Denike, was from Baltimore to Boston, and she was laden with a cargo of coal. Pursuing their respective voyages, the vessels came into collision, on the 18th of August, 1866, off Nausett Light, Cape Cod, about half past three o'clock in the morning, and the brig with her cargo on board was sunk, and both vessel and cargo were lost. Injury was also received by the schooner, but the master, at the time he gave his deposition, was not able to estimate the cost of repairs. In the District Court, a decree was entered for the libellant, in the sum of \$12,000 damages and costs of suit, and the claimant appealed to this court.

*F. C. Loring* and *S. Snow*, for libellant.

*John C. Dodge*, for claimant.

**CLIFFORD, J.** The theory of the libellant is that the two vessels were approaching each other from opposite directions, and that the collision was occasioned by the failure of the schooner to observe the eleventh sailing rule prescribed by Congress, which provides that if two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port so that each may pass on the port side of the



other. 13 Stat. at Large, 60. The views of the respondent are widely different, as he insists that the eleventh sailing rule has no application to the case whatever. On the contrary, he contends that the disaster was occasioned solely by the unskilful and improper management of those in charge of the brig in porting her helm when there was no risk of collision, and when if both vessels had kept their course they would have passed each other without coming in contact and in perfect safety. He denies that the eleventh sailing rule has any application to the case, for two reasons, which if correct in point of fact would show that the libellant is not entitled to recover the amount allowed in the decree of the District Court: first, because the two vessels were crossing within the meaning of the twelfth sailing rule, instead of meeting end on, or nearly end on, as is supposed by the libellant; second, because the schooner, when she was first seen by those in charge of the brig, was so far to the windward of the brig, that if neither had changed their course the latter would have passed to the leeward of the schooner without risk of collision. The exceptional clause in the twelfth rule provides in effect that when two sailing ships are crossing so as to involve risk of collision, and they have the wind on different sides, if the ship with the wind on the port side is close hauled and the other ship is free, then the latter shall keep out of the way. The argument for the respondent is that the case is controlled by that clause of the twelfth rule which is controverted by the libellant, chiefly on two grounds: first, he insists that the two vessels were meeting nearly end on, and not crossing, as the case must be to fall within that rule; and, second, he denies that the brig had the wind free, as assumed by the respondent. Disputed matters of fact, therefore, are involved in every issue between the parties, which depend in a great measure upon the conflicting statements of witnesses. Absolute certainty being unattainable in such a case, the statement of conclusions is all that is of any importance to the parties. Analyzed with care, the testimony, in the view of the court, proves that the following were the material circumstances which attended the collision, in addition to those already given in the preliminary statement of the case: the un-



doubted fact is that it was good weather and not very dark, as the witnesses on both sides agree that it was starlight. Libellant testifies that the wind was west by north, but the better opinion is that it was west-northwest, as it appears that the schooner was heading north by west, and it is fully proved that she was close hauled, and that she would lay within five points of the wind. Statement of the libellant is that the brig was heading south by west half west, so that if the wind was west-northwest, she was off eight and a half points. Full proof is exhibited that the brig was in good condition, well manned, and that she had good lights. The sea-worthy condition of the schooner is also conceded, and it is not disputed that she was well manned, but it is strenuously contended that she had no lights burning at the time of the collision. Regarding the point as one of importance, it has been carefully examined, and it appears to the court that the schooner had suitable lights, which might have been seen by those in charge of the other vessel. Both vessels had lookouts, and the lookout of the schooner testifies that he saw the lights of the brig when they were a mile and a half distant, and seven minutes before the vessels came together. His statement also is, that when he first saw the light he reported it to the pilot, and they both state that they saw the light two points over the lee bow of the schooner. Other witnesses confirm that statement, and it appears to be correct. The testimony of the master of the brig also is, that he first saw the light of the schooner one point over the lee bow of his vessel, but in that particular, in the view of the court, he was mistaken, as the better opinion is that the brig, before she ported her helm and luffed up into the wind, was somewhat to the leeward of the schooner. Speed of the schooner was five or six knots, and that of the brig was four or four and a half, and they were both sailing in a smooth sea, with a steady breeze. Inevitable accident is not pretended, and it is clear to the court that it is a case of unmistakable fault, for which one or both parties are clearly responsible. The sailing qualities of the brig are left in some doubt by the testimony, but she was upon the starboard tack, and in the opinion of the court had at least two points free. On the other hand, it is fully proved that the

schooner was upon the port tack, and that she was as close to the wind as she would lay; considered in the light of this statement, it is quite clear that the case does not fall within the eleventh sailing rule, as contended by the libellant. Even supposing there would have been actual danger of collision if both vessels had kept their course, which is not admitted, it is certain that they were not meeting end on, or nearly end on, within any reasonable construction which can be given to the language of the eleventh sailing rule. *The Constitution*, 2 Moore, P. C. N. s. 453; Same Case, 10 Law T. N. s. 894; *The Fingal*, 13 Law T. N. s. 611; *The Concordia*, 1 Law Rep. Adm. 93; Same Case, 12 Jur. N. s. 771; *The Braya*, 14 Law T. N. s. 258; *The Lady Normandy*, 14 Law T. N. s. 895. Granting that the two vessels were not meeting nearly end on, as contended by the libellant, then it follows that the brig was in fault, as it was her duty to keep out of the way if there was danger of collision, and if not, she had no right to attempt to cross the bows of the schooner at the risk of collision. When one of two ships is required to keep out of the way, the other is required as a correlative duty to keep her course, subject to certain reasonable and necessary qualifications. Special circumstances may exist in a particular case rendering a departure from the rule necessary in order to avoid immediate danger, and the act of Congress, among other things, expressly provides that nothing in these rules shall exonerate any ship . . . . from the consequences . . . . of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case. 13 Stat. at Large, 61; *N. Y. & L. S. S. Co. v. Rumball*, 21 How. 337. Respondent's own testimony shows beyond controversy that the pilot, when notified by the lookout that there was a light ahead, went forward and looked at it for several minutes, and then went aft, saying the approaching vessel was going all right. Beyond question he ought to have observed that there was a necessity for precaution, as the lookout does not pretend that the brig would have passed to the leeward more than her length if she had kept her course. The distance of the vessels apart when the brig ported her helm was at least one hundred and fifty

yards, and it is not doubted that if the pilot had continued to watch her course as he should have done, the collision would have been prevented. Instead of doing so, however, he turned round and walked aft, virtually leaving the matter in charge of the lookout. He gave the order "hard up," but it was too late to prevent the disaster. The excuse offered for the pilot is, that he had a right to keep his course; but rules of navigation were framed and designed to save life and property, and not for the purpose of promoting collisions. Such were the views of the Supreme Court long prior to the enactment of the steering and sailing rules, which expressly provide that nothing therein contained shall exonerate any ship from the consequences of the neglect of any precaution required by the ordinary practice of seamen, or by the special circumstances of the case. Common justice forbids that a party who voluntarily casts himself upon an obstruction shall be entitled to damages, and it is equally plain that a party inflicting an injury upon another ought not to be permitted to defend himself successfully against the act, because the injured party committed the first error, if he had seasonable notice of the error and ample means and reasonable opportunity to avoid inflicting any such injury. Experienced as the pilot was, he ought to have prevented the collision by porting the helm of the schooner. Her lookout saw the brig before the error was committed, and was looking directly at her when she ported her helm and attempted to cross the line of the schooner's course, and if the pilot had watched her course for a moment longer he would have had the same seasonable knowledge as was acquired by the lookout. Vigilance is required of those in charge of both vessels, and where there is negligence on both sides, both must share the consequences. The best judgment I can form in this case is, that there was fault on both sides, and the damages must be divided. No estimate was made of the cost of repairing the schooner, as that was not necessary in the view taken of the case by the court. Unless the parties agree to the amount of the damages, it will be necessary to send the case to a commissioner.

Decree reversed, and let a decree be entered that both parties were in fault, and that the damages and costs be divided.

SAMUEL L. DAVIS, Libellant and Appellant, v. WILLIAM W.  
WALLACE *et al.*

A vessel was chartered under a contract that she was to have "three working days to load" at the port of lading, and quick despatch in discharging at the port of discharge. On arrival at the port of discharge, the master notified the charterers, and was requested to call the following day, and received no orders as to his place of discharge till after the lapse of three days, when he went to the place to which he was directed. Nothing appeared to show that the delay was claimed as a matter of right by the consignees, but rather as a request voluntarily acceded to by the master. *Held*, that the libellant was not entitled to recover the rate of demurrage *per diem*, stipulated in the contract for the three days' detention.

After reaching the wharf designated by the consignees as the place of discharge, the libellant's vessel was detained four days before the unloading was completed: three by reason of the berth at the wharf being occupied by another vessel for whose departure the libellant was compelled to wait; one in consequence of the lack of teams to take the cargo away. *Held*, that libellant was entitled to recover the stipulated demurrage *per diem* for these four days of delay.

The contract in this case contained a clause that the cargo should be "received and delivered at the ports of lading and discharging as customary." *Held*, this clause referred to the manner of receiving and delivering the cargo, and had no reference to the question whether the libellant's vessel was justly required to wait her turn at the wharf, where she was ordered to discharge by the consignees.

Consignees cannot select a place of discharge within a port which would necessitate greater delay in discharging than the charter allowed.

Proof of usage at a port, in respect to the reception or delivery of a cargo, may be received to interpret the meaning of obscure or equivocal language in a contract, or in the absence of express stipulation, but demurrage is a matter of contract, the provisions of which usage cannot modify.

ADMIRALTY appeal. Libel for demurrage. The schooner Samuel Fish was chartered by the libellant to the respondents, to bring a cargo of coal from Georgetown or Baltimore, as they might elect, to Boston, at a certain freight per ton, and it was agreed that the respondents should have three working days to load at Georgetown, and quick despatch in discharging at Boston. In case the vessel should be longer detained, they were to pay demurrage at the rate of \$35 per day, provided such detention should happen by their own or their agent's default. It was further agreed that the cargo should be received and delivered as customary, at the ports of loading and discharging.

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The schooner took a full cargo of coal at Baltimore, July 7, 1863, and arrived at Boston, Thursday, the 23d of July. The master promptly reported his arrival to the charterers. When informed that the schooner had arrived, they replied that they had nothing to do with the cargo, and referred the master to the shippers and consignees. Due notice was given the consignees, and they informed the master that the cargo was not sold, and requested him to call again, on the next day, which he did. On Saturday, following the arrival of the schooner, the consignees directed the master to proceed to a certain wharf in South Boston to discharge. He reached the designated wharf on Sunday, but finding another vessel, which had not commenced to unload, he notified the charterers that he had no place at which to unload his vessel. The libellant's vessel, however, lay there until the following Thursday, when the vessel that had previously occupied the berth at the wharf went away, and the Samuel Fish hauled up and commenced to discharge. She commenced to discharge in the afternoon, but was delayed one day for want of teams to take away the cargo, and did not complete the discharge until the following Thursday. Damages were claimed by the libellant for failure to comply with the stipulations of the charter-party. In the District Court a decree was entered in favor of the respondents.

*J. C. Dodge*, for libellant.

First. Did this vessel have "quick despatch," according to the contract?

Second. If she did not, did the detention happen by the default of the charterer?

1. Let us first ascertain the meaning of the term "quick despatch," in its application to the loading and discharging of vessels. The law seems to be settled, that in the absence of any express contract authorizing delay in discharging, or usage so well settled and uniform as to raise an implied contract, the consignee is bound to receive the cargo as soon as he is notified of the readiness of the carrier to deliver it. No doubt, in this as in every other case of a contract in which time of performance is not stated, we may apply the formula of "reasonable time,"

but this does not imply delay for the convenience or profit of the consignee, any more than in land carriage. The contract is, to carry and deliver the cargo. There is nothing in it authorizing the consignee to use the vessel as a storehouse.

The liabilities of a carrier are very onerous, and are not to be protracted beyond the contract. If the cargo is not received by the consignee when offered, it remains in possession of the carrier, not as carrier, but as bailee in deposit. But the carrier has not stipulated to assume this new relation to the cargo; and if he does so at the request or for the convenience of the consignee, the law implies a promise of payment for this new service. *Clandaniel v. Tuckerman*, 17 Barb. 184, and the cases there cited; *The Salmon Falls Manufacturing Company v. The Bark Tangier*, 21 Law Rep. 6, 8; *Richardson et al. v. Goddard et al.*, 23 How. 28, 40.

Such being the legal rights of the parties without a special contract, and in the absence of usage, it cannot reasonably be pretended that less than this was intended when they contracted for "quick despatch."

The truth is, that these words were inserted in the contract, to guard against being detained by virtue of a usage that has grown up in Boston, to wait three days, in the absence of a contract, before having a berth at which to discharge. The purpose was, to give this vessel the same rights she would have had by law, without the usage.

2. Was this detention by the default of the charterers or their agents? The term means failure on the part of the charterers to perform what they are bound to perform by the charter. If the vessel does not have "quick despatch" because the charterers, or persons standing in their place, fail to receive the cargo, the demurrage is due. If the delay is caused by neglect on the part of the vessel to deliver the cargo, then it would not be due. See the use of the term in *Abbott on Ship*. 307. See *Randall v. Lynch*, 2 Camp. 352 - 356.

Under our charter with the defendants, a cargo is taken on board consigned to Lewis Audenried & Co., at Boston, but no particular wharf is specified. We arrive; the defendants refer

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us to the consignees, who order us to How's Wharf at South Boston. And there most of the detention takes place.

Our claim is, that when we reported, we should have been sent at once to a berth where unloading might be commenced without delay, and that the cargo should have been received without interruption for want of teams.

It seems a practice has grown up in Boston for a vessel arriving with coal under the ordinary bill of lading only, without a charter or any stipulation as to time of discharging, to wait three days, if the consignee desires it, for him to sell the coal. I do not stop to inquire whether this is a good custom, because, under our stipulation for "quick despatch," the custom has no application to us. It cannot control our express contract. *The Reeside*, 2 Sumn. 567; *Macomber v. Parker*, 13 Pick. 176, 182.

It will be found that in every case relied upon by respondents, that the vessel had undertaken, expressly or by implication, to load or unload her cargo at a particular wharf or dock.

*David Thaxter*, for respondents.

Upon all the evidence, it is therefore fair to say that these facts are not in controversy, to wit: —

That coal-laden vessels discharge at coal wharves to which they are assigned.

That the capacity of these wharves is limited.

That the peculiarities of the trip often bring a large fleet of vessels here, requiring them to wait their turns at the wharves at which they are to discharge.

That vessels do invariably wait their turn in discharging, upon being assigned a wharf.

Now it is well settled that in the absence of any express agreement, fixing the time for unloading, the law implies a contract to unload in the usual and customary time for unloading such a cargo, having reference to the usual and customary manner of discharging, such as waiting turns, at the port of discharge. *Rodgers v. Forresters*, 2 Camp. 483; *Burmester v. Hodgson*, 2 Camp. 488; *Nichols v. Tremlett*, 1 Sprague, 361; 2 Holt on Ship. 27; Mau. & Pol. Sh. 177; Lawes on Charter-Parties, 133; Mac-lachlan on Ship. 445; *Harris v. Dreesman*, 25 Eng. L. & Eq. 526; *Parker v. Winlow*, 7 El. & B. 942.



It appearing, therefore, that the waiting for turns is a matter of frequent, constant occurrence at this port, and that it is the invariable rule for vessels to wait their turn in discharging, to entitle the libellant to recover for any detention thus caused, he must show an express agreement to pay for such detention, or such a well-established and recognized usage to pay so known to the trade as to be recognized and treated as part of the contract.

It is to be borne in mind that respondents' sole liability for any detention rests upon this proviso: "Provided such detention shall happen by default of the said parties of the second part [the respondents] or their agent."

This clause, peculiar to American charter-parties, has received a judicial construction by the State court, — the only construction of which it is capable if it is to have any operative value in the contract. *Towle v. Kettell*, 5 Cush. 18.

It appears by the first article of the libel, admitted in the answer, that the libellant, the master of the schooner, sailed her "on shares," having the exclusive management, navigation, and control of her. That this created him owner *pro hac vice* of the schooner is well settled. *Thomas v. Osborn*, 19 How. 22; *Webb et al. v. Peirce*, 1 Curt. 104.

Having this authority as owner, he made this charter with the defendants, and with the same authority he made the contract with L. Audenried & Co. to transport and deliver the coal in question according to the terms of the bill of lading then signed by him, and under which it was shipped.

Even if he had not been, as he was, owner *pro hac vice*, but merely master, yet under this charter-party the custody of the vessel would remain in her owners, and the master would be their agent, and in giving this bill of lading the owner would be bound thereby as against the shippers. *Schooner Freeman v. Buckingham*, 18 How. 182.

Now, this bill of lading is in the usual form, without any stipulation in regard to the time and manner of delivery, and, therefore, requires the master to deliver, and the shippers or consignees to receive, as, and only as, customary; that is, in the time which would be required to discharge her in the usual



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and customary manner ; and this cargo, as has been seen from the testimony, was so discharged and received.

It is submitted, however, that, by the true construction of the charter-party, the contract for delivery is substantially the same as that which the law implies in the absence of any express agreement, as in the case of an ordinary bill of lading.

The manner of delivery must necessarily affect the time in which delivery can be made, and any provision for the quick despatch of a vessel, which also provides that such delivery shall be made in the customary manner, can only be interpreted with reference to the manner in which the vessel is discharged.

Plenary evidence that such was the construction intended by the parties may be found in the provision in regard to the lading of the vessel. It cannot be doubted that the time actually required to discharge a cargo of coal, the vessel having a berth and all the conveniences for discharging, was known to the libellant, who was familiar with the trade ; yet, while he limited the exact time for loading, for discharging he stipulated that she should be discharged in the customary manner with quick despatch. It is obvious that the parties agreed that the vessel should discharge as other vessels discharge, but that there should be no default in the defendants while thus discharging her to give her quick despatch.

CLIFFORD, J. Thirteen days elapsed in the efforts to secure a berth and in discharging the cargo, without reckoning the day of the arrival or the day the discharge was completed. Prior to the directions given to proceed to the wharf at South Boston, it may reasonably be inferred that the master acquiesced in the neglect to designate a place for the discharge of the cargo ; and if so, then the day of the arrival of the schooner and the Friday and Saturday following should be deducted. Perhaps Sunday was spent in getting to the wharf and in preparations for unloading. Whether the second notice to the charterers was given on Sunday afternoon or Monday morning does not appear ; but computing the delay in the most favorable light for the respondents, it is clear that there was a loss of three, if not four, full days for the want of a place to discharge and deliver the cargo before the

stevedores were able to commence the work. They also lost one day afterwards for the want of teams to take the coal away, making at least four days of unnecessary delay, for which the respondents are clearly responsible, unless the defence set up in the answer can be maintained. Payment for six days' delay is claimed in the libel, but it seems to the court, for the reasons already suggested, that none of the time prior to the arrival of the schooner at the wharf in South Boston should be reckoned against the respondents. The defence set up in the answer is, that the schooner on her arrival was directed to a certain wharf to discharge, that she had a berth at that wharf in her regular turn, and that the master was enabled to commence the discharge of the vessel within the time and in the manner established by the usage and custom of the port for the unlading of vessels engaged in the coal and other coasting trade. The admission of the answer also is, that the schooner, when she proceeded to the wharf where she was directed to discharge, found the berth occupied by another vessel, and was obliged to wait for a turn until that vessel completed her discharge, and the period of delay, as stated in the answer, is somewhat longer than is shown in the proofs. A delay beyond what is ordinarily necessary during the discharge of the vessel is also admitted in the answer, but it is ascribed to the inability of the consignees to obtain stevedores, in consequence of the extreme heat and large arrival of coal, and not to the want of teams to remove the coal, as alleged in the libel. The respondents in argument make two points of defence on which they chiefly rely : first, they contend that the consignees had a right to select the wharf where the schooner was to discharge, and that if the berth was occupied by another vessel when she arrived there, she was bound to wait her turn without any charge for demurrage ; second, that vessels arriving at this port loaded with coal not previously sold by the consignees are, if requested, obliged by the usages of the port to wait three days before commencing to discharge, to give the owners of the coal an opportunity to effect a sale. Whether the consignees effected a sale of the coal before they designated a place for discharging the same does not appear, but it does appear that the wharf desig-

nated belonged to a third person, and was not one occupied by the consignees. Undoubtedly the consignees, as the agents of the charterers, had a right to designate the place where the vessel should discharge the cargo, but it must be one within the terms of the charter-party. They could not go out of the port of destination, nor could they select one within the port which would involve greater delay in discharging than the charter allowed. Express reference was made in the bill of lading to the charter-party, so that the consignees had no greater rights than the charterers. The charterers were allowed "three working days to load" at the port of departure, and they stipulated to make "quick despatch in discharging at" the port of destination; and the consignees had the same rights and were bound by the same obligations. Reference is made by the respondents to the stipulation in the charter-party that the cargo "shall be received and delivered at the ports of loading and discharging as customary." But it is evident that that clause refers to the manner of receiving and delivering the cargo, and that it has nothing to do with the question under consideration. Where there is no special contract, the usage of the port in respect to the reception and delivery of the cargo, in controversies between the ship-owner and the consignee, is frequently a very material consideration; but demurrage is a matter of contract, and it is well-settled law that usage cannot prevail over or nullify the express provisions of a contract. *Bliven et al. v. N. E. Screw Company*, 23 How. 431; Add. on Con. 970. Proof of usage is admitted either to interpret the meaning of the language of the contract or to ascertain its nature and effect in the absence of express stipulation, and where the meaning is equivocal or obscure; but the proof of usage is not admitted to contradict express stipulations, or to vary the language employed by the parties where their meaning is expressed in plain and unambiguous terms. *The Reeside*, 2 Sumn. 569. Such delay as occurred before the schooner arrived at the wharf designated by the consignees will be left out of view at present, and will be separately considered in examining the second ground of defence. First defence is, that the schooner was properly required to wait her turn at the wharf where she was

directed to discharge by the consignees. By the terms of the charter-party the schooner was entitled to quick despatch at the port of discharge; and the libellant contends that the proposition of the respondent is in direct conflict with the stipulation of the charter-party. Demurrage is the sum fixed by the contract of affreightment as a remuneration to the ship-owner for the detention of the ship beyond the lay-days allowed for loading or unloading the vessel. *Mau. & Pol. Sh.* 176; *Pars. Mar. Law*, 261. Stipulations are usually inserted in charter-parties and bills of lading, to prevent disputes and define the rights of parties in case of unforeseen delays in loading or unloading, specifying that a certain number of days called running or working days are allowed for that purpose, and it is frequently stipulated that the charterer or freighter may delay the ship for a further specified time at an agreed price per day for such over-time. Sometimes the contract is, that the vessel shall be loaded and discharged in the usual time, or within a reasonable time after her arrival in port, or that the freighter shall be allowed the usual and customary time to load or unload at the port of loading or discharge. In other cases the contract of affreightment is without any such definite condition; but even in those cases the owner, if the ship is improperly detained, may frequently have a special claim to damage in the nature of demurrage. The settled rule is, where the contract of affreightment expressly stipulates that a given number of days shall be allowed for the discharge of the cargo, that such a limitation is an express stipulation that the vessel shall in no event be detained longer for that purpose, and that if so detained, it shall be considered as the delay of the freighter, even where it is not occasioned by his fault, but was inevitable. *Field v. Chase, Hill & Denis*, 51. Where the contract is, that the ship shall be unladen within a certain number of days, it is no defence to an action for demurrage that the over-delay was occasioned by the crowded state of the docks, or by port regulations, or government restraints. Detention of the vessel for loading or discharging longer than the time allowed by the contract entitles the owner to the stipulated demurrage, although it was impossible to complete the work within that time

by natural causes. *Randall v. Lynch*, 2 Camp. 352; *Barret v. Dutton*, 4 Camp. 233; *Hill v. Idle*, 4 Camp. 327; *Furnell v. Thomas*, 5 Bing. 188. Much reliance is placed by the respondents upon the case of *Rodgers v. Forresters*, 2 Camp. 483; and also upon the case of *Burmester v. Hodgson*, 2 Camp. 488; but it is quite clear that they are not applicable to the present case, unless it be held that the words "quick despatch in discharging" have no meaning whatsoever. Stipulations, express or implied, that the ship shall not be detained beyond the period or periods specified in the contract of affreightment are not controlled by the usage of the port where the vessel is to load or discharge; and if the freighter detains the vessel beyond the time specified, he is liable to an action on the contract adapted to the nature of the instrument and the practice of the jurisdiction where the suit is brought. Ab. Sh. 303; *Clendaniel v. Tuckerman*, 17 Barb. 184. Just prior to the arrival of the plaintiff's vessel an unusual number of other vessels arrived at the defendant's wharf for the purpose of discharging their cargoes. They had been held back for a time by a storm, but being first at the wharf they were entitled to priority in turn. The consignee had but one wharf, and he offered to prove the circumstances at the trial, as an excuse for the delay, but the judge excluded the evidence, and the Court of Appeals held that it should have been admitted. A direct admission, however, is made in the opinion that the defendant would be liable, if he was in fault, in suffering such an accumulation of craft, laden with cargo for himself, for the same wharf, at the same time. But the court also ruled that where there is an express contract, the parties are held strictly to its terms, and that no excuse, as a general rule, is available in such cases for delay; considering that the whole delay in that case did not exceed two days, it may be that the decision is correct, upon the ground that the discharge, in view of the circumstances, was within a reasonable time. Conceding the correctness of that decision, still it cannot affect the case at bar, as by the express terms of the charter-party the owners of the vessel were entitled to quick despatch in discharging, and it cannot be admitted that thirteen days' delay was not a violation of that provision. Par-

ties may contract as they please, but their contracts must be construed and executed as they are made. They may contract that the ship shall wait any number of days before commencing to load or discharge, and that the freighter shall have any number of lay-days, with or without charge, or none at all, or that the ship shall load or discharge in turn ; but any such special arrangement, enlarging the time for loading or discharging, is matter of special contract. Even the covenant to load with usual despatch excludes every delay on the part of the shipper beyond " the ordinary time for bringing the cargo to the place of landing and loading." *Kearon v. Pearson et al.*, 7 H. & N. 386. Viewed in the most favorable light for the respondents, it must be understood that the stipulation for quick despatch in discharging excludes all delay save the time employed in unloading and delivering the cargo, except what is occasioned by natural causes beyond the control of the party contracting. Such exception was denied in the case of *Kearon v. Pearson et al.* ; and it is clear that it cannot be admitted where the covenant is only for usual despatch ; it cannot be admitted in cases like the present. The power to designate the place of discharge belongs to the consignee, but he is bound to select a place where the ship will encounter no delay beyond the time necessary for the unloading of the vessel where the delivery and reception of the cargo is required by law. *The Eddy*, 5 Wall. 490 ; *The Bird of Paradise*, 5 Wall. 545. Delay beyond that, if occasioned by natural cause over which the defendant has no control, may, perhaps, be excused in a case where there is no express contract as to time, but that question does not arise in this case, and no decided opinion is expressed upon the subject. Enough has already been remarked to show that, in the view of the court, the second question presented by the respondents does not arise in the case, for the reason that the master appears to have acquiesced in the delay without complaint or notice to the respondents that he should hold them responsible. When told that the coal was not sold, and requested to call on the following day, if he did not intend to acquiesce in the consequent delay, he ought to have said so, or in some manner to have signified to the consignees

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that he did not waive the right of the ship-owner. Nothing appears in the record to warrant the conclusion that the delay at that time was claimed by the consignees as matter of right ; but in view of the circumstances it is much more reasonable to infer that it was but a request, and as such was voluntarily acceded to by the master. Regarded as a claim of right, very strong doubts are entertained whether it could be sustained in any case, and it is quite clear that such a usage, if proved, can never avail as a defence where it comes in conflict with the terms of the contract. Usage is never held to make a contract, and proof of it will never be admitted to contradict a contract expressed in clear and unambiguous terms. The libellant is entitled to recover for four days' unnecessary delay of the schooner in discharging at the port of destination.

The decree of the District Court is reversed, and let a decree be entered for the libellant.

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THOMAS MANDELL, Executor, v. EBENEZER W. PIERCE.

On May 1, 1866, a tax was assessed upon the income of the plaintiff's testatrix, from the 1st of January, 1865, to July 2, 1865, the day of the testatrix's decease. The amount of the tax was paid under pro'est, by the plaintiff, as executor, to prevent the distraint of property, and brought suit to recover the amount. *Held*, that the tax was legally assessed against, and collectable from, the plaintiff as executor.

The liability in this case accrued in the lifetime of the recipient of the income, at whose death it passes over to the executor or administrator, as a debt against the estate.

When the recipient dies within the year, the return must be made by the executor or administrator.

The tax is imposed upon the income of the property of the decedent, and the liability is not discharged because the decease occurs before the time appointed by law for making the return upon which the tax is predicated.

ASSUMPSIT to recover the amount of an internal-revenue tax, paid under protest. Facts agreed.

Sylvia Ann Howland, of New Bedford, single woman, died July 2, 1865, and the plaintiff, also of New Bedford, was during said year duly appointed executor of her last will, and was at the time of the suit such executor. The plaintiff, as such execu-



tor, was required by the assistant assessor of internal revenue for the First Collection District of Massachusetts, in which New Bedford is situate, to make return of the income received by said Sylvia Ann Howland, during that portion of the year 1865, which said Sylvia Ann was in life, and did make such return under written protest indorsed thereon, not conceding any liability to taxation thereon, and protesting against the same. On May 1, 1866, the assistant assessor assessed a tax on the income of said Sylvia Ann Howland from and including the 1st of January, 1865, up to July 2, 1865, the day of her decease, of \$4,512.36, and the plaintiff appealed to the assessor, who sustained and affirmed the taxation, and the plaintiff subsequently appealed to the commissioner of internal revenue, who affirmed the taxation and dismissed the appeal. The tax was transmitted and certified to the collector of internal revenue for said district for collection, and the defendant having been appointed collector of internal revenue for said district, passed into his hands, as such collector, for collection ; and the defendant, under color of his office, as such collector, through his deputy, demanded of the plaintiff, as such executor, the payment of said tax ; the plaintiff declined to pay the same, whereupon the defendant, as collector as aforesaid, through his deputy, threatened to collect said tax by distraint of property, and was proceeding so to collect it by force, when the plaintiff, in order to avoid a distraint of property, on the 6th of September, 1866, paid the defendant said tax of \$4,512.36, under written protest.

*T. D. Elliot and T. M. Stetson*, for plaintiff.

The income-tax law does not authorize the tax in this case.

Sylvia Howland died in no default as to taxation, and before any return could be required of her or income tax could be assessed upon her. No debt or liability of hers passed to the plaintiff, and the estate was then in his hands subject only to the laws taxing estates. *Cooke et al., Petitioners, &c.*, 15 Pick. 237.

And there is no statute providing such tax as the defendant has collected.

The case constantly arises under the State law of Massachusetts, and it was never supposed that an income duty could be assessed unless the party was in life at the date, May 1.



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No apportionments of income tax are authorized by the statute. The year is the taxable unit.

An income is the result of the transactions of a period. A man may gain one day and lose the next. Some period must be determined by law which shall give the just mean and exhibit of real loss or real gain. Otherwise the government, by a system of comminution, might derive taxes from profitable months or weeks, and not repaying for the unprofitable ones, might gain large income taxes where the citizen had in fact no income.

The unit is by the statute the calendar year.

Act 1864, June 30, § 116, relates to "annual gains, profit, or income," and "income for the year ending December 31, 1865." And it allows deduction "for State, county, or municipal taxes paid within the year." And this last allowance cannot be effected unless the calendar year is for purposes of income tax regarded as one and indivisible. Indeed, in Massachusetts, the assessment of State, county, and municipal taxes is not completed, so that demand or payment can be had, till much later in the year than the date of S. A. Howland's decease.

§ 117 instructs how to estimate such "annual income," income "for each year," by instructions entirely inapplicable to lesser periods of time.

§ 116 shows who are liable to income tax, and that is only "persons," and of such only "those residing in the United States, or citizens of the United States residing abroad."

Which description does not include the dead or the estates formerly theirs.

The deduction of \$600 is provided to come out of a year's income, and no arrangement exists for apportioning it among the parts of a year, either by time or by actual receipts.

Throughout the statute no "estate" is spoken of in connection with income tax.

§ 116 speaks of real-estate purchases and sales, and expressly provides a "year" as the period of realization for the purposes of income tax.

§ 117. Deductions also of repairs to an extent not greater than the average of five years is permitted. It is manifest that

such a deduction cannot come out of any single day's, but from the balance of a year's fortune.

§ 118 is very significant. The income tax is based on a return required, not of deceased people, but "of all persons of lawful age," and who else? Here would be the place to provide for the case of an estate. Such return precedes the assessment and liability which falls on May 1, and therefore if a person is dead before such return, there could be no return, and *a fortiori* no liability. Besides persons of lawful age, "guardians and trustees are required to make return of the income of the minor or *cestui que trust*," and no provision whatever requires an executor, as such, to make return of the income received by his principal during any period of his life.

The "guardians or trustees" must make return of the income of those for whom they act as guardian or trustee.

And if it were possible in a loose sense to style an executor a "trustee," it would still be impossible to style him a trustee for the deceased testatrix.

The omission to require a return from executors or administrators is the more marked in § 118, because the section does mention the words "executors and administrators," and does require a return from them, so far as they are guardians or trustees, of the amount of the income of the *cestuis que trust*, i. e. the heir or legatee. This refers to the frequent case where an executor has, in addition to his proper duties as executor, certain trust duties imposed by a will. *Miller v. Congdon*, 14 Gray, 114.

A collector of internal revenue is liable to suit if he collects an illegal tax by force; i. e. he cannot justify his tort under the laws.

So if he still proceeds after being told in writing of the error and illegality, and the refusal to pay and purpose to recover back.

For in such last case he is fully warned, goes on at his choice and peril, and can require indemnity of his principal before paying over. *Elliott v. Swartwout*, 10 Pet. 153.

The above principles are those of common law. *Elliott v. Swartwout*, 10 Pet. 153; *Bend v. Hoyt*, 13 Pet. 263; *Curtis's Administratrix v. Fiedler*, 2 Black, 461.

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*G. S. Hilliard*, United States Attorney, and *W. A. Field*, Assistant United States Attorney, for defendant.

The recent statutes of the United States and the sections of the same relating to taxes on income are the following : —

§§ 49, 50, 51, c. 45, 1861, 12 Stat. 309 ; §§ 89, 90, 91, 92, 93, c. 119, 1862, 12 Stat. 473 ; § 1, containing amendment to § 98, *ubi supra*, and § 11 of c. 74, 1863, 12 Stat. 718, 723 ; §§ 116, 117, 118, 119, c. 173, 1864, 13 Stat. 281 ; § 1, c. 78, 1865, 13 Stat. 479, 480 ; § 9, c. 184, 1866, 14 Stat. 138 ; § 13, c. 169, 1867, 14 Stat. 477, 478, 479.

The statutes in force at the time of the decease of said Sylvia Ann Howland and of the assessment of the tax in question, are c. 173, 1864, §§ 116 – 119 ; c. 78, 1865, § 9, containing amendments to §§ 116 – 119, *ubi supra*.

In the statutes of the Commonwealth of Massachusetts express provision is made for the assessment of taxes upon the real and personal estate of persons who decease before the 1st of May. Gen. Stat. of Mass. c. 11, §§ 10 – 12, ¶¶ 5 and 7, pp. 75, 76.

The construction contended for by the plaintiff must be either that the person upon whose income the tax is levied must be alive on the 1st of May of the succeeding year and on the day on which the tax is actually levied, or that the tax upon incomes can never be levied for a fraction of a year.

The provisions of §§ 124 – 150, c. 173, 1864, relating to taxes upon legacies and distributive shares of personal property, and on succession to real estate on the decease of any person, have no special application to this case. The estates of all persons who die are liable to these last-mentioned taxes, without regard to the day of their decease.

The question is also to be distinguished from a tax levied upon an executor for income received by him as executor.

There is no legal reason why Congress could not, and no legislative reason why Congress should not, impose a tax upon the actual income received by any person who dies before the levy ; the only point in dispute is, Has Congress so enacted ?

It is not pretended that the tax becomes a debt for the satisfaction of which a suit can be brought or a distraint made until the

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tax has been actually assessed or levied, but it is contended that on May 1, 1866, the estate of said Sylvia Ann Howland, or the defendant, as the executor of her last will, was liable to the assessment of this tax, and after this assessment the tax was legally collectable out of the estate.

Section 116, as amended is, substantially, that the tax shall be levied annually upon the annual income of every person residing in the United States or of any citizens of the United States residing abroad. In terms it purports to be a tax to be levied, not upon a person, but upon the income, to be assessed annually and for the whole calendar year. When a person dies his property is not derelict. On the probate of the will and appointment of the executor, or on the appointment of an administrator, the legal title to the personal property vests by relation, from the time of decease, in the executor or administrator, and these personal representatives continue to receive the income until the estate is administered upon.

If the income received by said Sylvia Ann Howland up to July 2 should have been added to the income received by the defendant, as her executor, up to January 1, 1866, and one tax assessed for the whole year, that only proves that too small a tax has been assessed, and does not render the tax invalid. The facts find that the amount of the tax is correct, if the tax can be assessed at all. The proper deductions have been made. The \$600 is not strictly a deduction; the tax is upon the excess of income over \$600, and the whole \$600 is to be taken out when the tax is for fractions of a year.

The deduction of \$117 can as well be taken out for fractions of a year as for a whole year, the language being in general, either that certain things shall not be included, or certain amounts actually paid by the person whose income is taxed shall be deducted.

Section 118 makes it the duty of all persons of lawful age to render a list, etc., but the tax can be levied even if no list is rendered; besides, the legal representatives must be compellable to perform the duties the law imposes upon the deceased person they represent, if the tax be leviable at all.

In section 118 the word " trustee " is meant to include all persons who receive income in any fiduciary capacity, and expressly mentions executors and administrators. All incomes received by any person, the beneficial interest in which belongs to any other person, must be taxed under the section 118. This section means that estates shall pay an income tax.

This income tax is really a tax upon things, to wit, upon income to be paid by persons, but it is independent of the life of any particular person.

CLIFFORD, J. Annual gains, profits, and income of persons residing in the United States or of citizens of the United States residing abroad, whether derived from property, rents, interests, dividends, or salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, or from any other source whatever, were subject annually, by the act of the 30th of June, 1864, to a duty of five per centum, on the excess over \$ 600, and not exceeding \$ 5,000 ; and by the amendatory act of the 3d of March, 1865, it was provided that such annual gains, profits, and income are subject annually to a duty of ten per centum, on the excess over \$ 5,000. 13 Stat. at Large, 281 - 479.

Rules are therein enacted prescribing the mode to be adopted in ascertaining the income of any person liable to an income tax. Such of those rules as are material to the present investigation may be stated as follows:—

1. That the duty should be assessed, collected, and paid upon the gains, profits, and income for the year ending the 31st of December next preceding the time for levying, collecting, and paying the same.

2. Duties on incomes as therein imposed are required to be levied on the 1st of May in each year, and they were therein declared to be due and payable on or before the 30th of June in the same year. 13 Stat. at Large, 283.

3. Incomes received from institutions whose officers are required by law to withhold a per centum of their dividends, and pay the same to the commissioner or other officer authorized to receive the same, and income derived from notes, bonds, and

other securities of the United States, and also all premiums on gold and coupons, were required to be included in the estimate ; but the provision was, that the amount so withheld by such institutions should be deducted from the tax which would otherwise be assessed. 13 Stat. at Large, 479.

4. One deduction only of the \$600 could be made from the aggregate income of all members of any family composed of parents and minor children or husband and wife.

5. Net profits realized by sales of real estate purchased within that period were required to be deducted from the income of that year.

6. Taxes paid within the year, whether State, national, county, or municipal, were required from the gains, profits, or income of the person paying the same, whether owner, tenant, or mortgagor.

Other deductions were also required to be made as specified in the substitute for the 117th section, as enacted the succeeding year. 13 Stat. at Large, 479.

Plaintiff's testatrix died on the 2d of July, 1865, and the agreed statement shows that the plaintiff was duly appointed the executor of her last will and testament.

The residence of the decedent, during the year preceding her death, was at New Bedford, which is included in the First District in this State for the collection of internal revenue. Pursuant to the requirement of the assistant assessor for that district, the plaintiff made return of the income made by his testatrix during that portion of the year which had elapsed at the time of her decease ; but he denied the power of the officer to require any such return, and made it under protest. Despite the objections and protest of the plaintiff, the assistant assessor, on the 1st of May, 1866, assessed a tax on the gains, profits, or income of the decedent, as returned for that portion of the year preceding her death, of \$4,512.36. Appeals were regularly taken by the plaintiff, first to the assessor of the district, and subsequently to the commissioner, and those officers respectively affirmed the taxation. Payment was subsequently demanded by the collector, and the plaintiff, on the 6th of September, 1866, paid the amount, under a written protest, to avoid a distraint of his property.

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Technical forms are waived by the parties on both sides, as appears by the agreed statement. They agree that if the income received by the decedent for that portion of the year prior to her death was liable to taxation as income, under the internal-revenue laws, then the tax was legally assessed, and that the amount is correct, and that the defendant acted in accordance with law.

On the other hand, it is also agreed that the appeals and protests were sufficient in matter and form, and that the suit was seasonably brought, after due demand.

Viewed in the light of those admissions, doubt could not be entertained as to the liability of the income of the decedent to taxation, under the internal-revenue laws, if she had lived through the entire income year, and had been in life when the tax was assessed. Assessment, in that event, undoubtedly would have been made for the gains, profits, and income for the entire year; but it is equally certain that the amount received prior to the 2d of July would have been equally liable to taxation, at the time appointed by law for the assessment, even if it appeared that she had ceased on that day to be the owner of any property, and had never afterwards, during the remainder of that income year, received any gains, profits, or income. Beyond question, her liability to taxation would have been the same in that event, except as to amount, as if she had continued to be the owner of property, and the recipient of gains, profits, and income, during the remainder of the income year. Equal distribution of the gains, profits, and income over every portion of the income year is not a condition precedent to the liability to taxation, under the internal-revenue laws.

On the contrary, gains, profits, and income received within the income year are annual gains, profits, and income within the meaning of those laws, although the whole amount of the same in a given case may be received within the first month or the last month of the year. Such liability attaches to all gains, profits, and income received within the income year, although the property from which such gains, profits, or income are derived is acquired within the year or is conveyed away before the year closes; and the same rule will apply, although it appears



that the gains, profits, or income were derived from a business or avocation which from its nature could not be pursued, or was not pursued, only for a part of the income year.

Great inequality would flow from the opposite rule of construction, as all persons who changed their business within the income year, and all those engaged in avocations which from their nature cannot be pursued throughout the year, would escape all such taxation. Obviously such a construction would defeat, instead of carrying into effect, the intention of Congress, and therefore it cannot be admitted. When ascertained as required by law, the intention of Congress was, that gains, profits, and income received within the income year, from the sources therein defined, should be subject to the prescribed taxation, whether such gains, profits, or income were derived from any kind of property, rents, interest, dividends, salaries, or from any trade, profession, employment, vocation, owned, collected, pursued, or followed for the whole or any part of the income year.

All such gains, profits, or income received within that year prior to the 2d of July were liable to taxation, under the internal-revenue laws, subject to the deductions which those laws allowed in ascertaining the aggregate amount as the basis for the computation of the tax. In ascertaining the aggregate amount of the gains, profits, or income liable to such taxation, the same deductions were required to be made, as would have been if the testatrix, instead of having deceased, had ceased on that day to be the owner of any property, and for the residue of the income year had received nothing as gains, profits, or income within the meaning of those laws.

Argument is unnecessary to show that all the gains, profits, or income received by the decedent, within that income year, are those which accrued prior to July 2, and that it would be absurd to suppose that she continued to own property after that day, or that she sustained any subsequent loss, within the meaning of those laws. The principal objection to this theory is, that the death of the testatrix occurred before the time appointed for making the required return; and the argument is, that in that state of the case no return can be required by her legal repre-



sentatives. All guardians and trustees, whether as executors, administrators, or in any other fiduciary capacity, are required under the law then in force to make and render a list or return, in such form and manner as the commissioner should prescribe, to the assistant assessor of their district, of the amount of gains, profits, or income of any minor or person for whom they acted as guardian or trustee. 13 Stat. at Large, 480.

Taxes or duties on incomes thereby imposed are required to be levied on the 1st of May, and the provision is, as before explained, that they shall be due or payable on or before the 30th of June in each year. 13 Stat. at Large, 283.

Guardians are required to make return for their wards, trustees for their *cestuis que trust*, and executors or administrators for whom they act. Suggestion is made that the testatrix, after her decease, was not a person residing in the United States, but the suggestion is quite too technical to be entitled to weight, as the executor in the case of a will is the legal representative of the deceased, and by virtue of his appointment, and the probate of the will, is bound to execute the trust reposed in him, by the terms of the will and the testamentary laws of the State.

He is bound to collect all debts which are due, or which fall due to the decedent, and to pay all debts due from the decedent, or which fall due after his decease, unless the assets of the estate are insufficient. Such taxes as accrued before the decease of the testator or testatrix are a debt against the estate, and as such must be paid by the executor out of the assets of the estate. Liability to taxation arises, and in some sense it may be said that the taxes accrue, at the time the gains, profits, and income pass into the hands of the recipient. Return is required in every case before the day of levy, so that it is clear that the tax is due, that is, the recipient of the gains, profits, and income is liable for it before it is assessed, as the return is only to ascertain whether the liability exists, and its extent. 13 Stat. at Large, 225.

Evidently such liability, in a case like the present, accrues in the lifetime of the recipient of the gains, profits, and income, and at his or her decease it passes over to the executor or administrator as a debt against the estate. Where the recipient dies

within the year, he or she cannot make any return, and the duty of making it in that event devolves on the executor or administrator, as the legal representative of the deceased. The requirement of the law is, that the return shall be made in the collection district where the person resides upon whom the duty of making it is imposed; and it seems but a reasonable construction of that provision, to hold that in cases like the present, it may include the executor or administrator, as no return can be made by the actual recipient of the gains, profits, or income. Concede that an executor or administrator under that provision may be regarded as a trustee, still the argument is, that it is impossible to regard him as the trustee for the decedent, which perhaps is a sound proposition as a technical rule; but he is the legal representative of the deceased, and as such is bound to collect the dues and pay the debts, and administer the estate, which is a sufficient answer to the proposition as applied to the case before the court. Internal-revenue taxes are also levied on persons having in charge or trust as executors, administrators, or trustees any legacies or distributive shares arising from personal property, where the whole amount shall exceed \$1,000 in actual value; and the argument is, that those taxes in case of deceased persons, dying within the income year, are a substitute for the income taxes required to be paid by persons in full life; but it is impossible to adopt the proposition, as the legacy and succession taxes are entirely distinct from the taxes on gains, profits, and incomes. 13 Stat. at Large, 287.

Income taxes accrue on gains, profits, or income received by the testator or intestate in his lifetime; but legacy and succession taxes accrue subsequent to the death of such testator or intestate. A suit may be maintained against a collector of internal revenue, to recover back taxes illegally exacted, if the payment was made under written protest to prevent a distraint of the plaintiff's property; but the taxes in this case, under the agreement of the parties, were in judgment of law legally assessed against the plaintiff as executor of Sylvia Ann Howland, deceased.

Judgment for the defendant for the costs of suit.

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Union Sugar Refinery v. Mathiesson.

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THE UNION SUGAR REFINERY v. FRANCIS O. MATHIESSON.

BEFORE CLIFFORD AND LOWELL, JJ. <sup>1</sup>

Upon the final hearing of a cause in equity, a final decree was entered, and the cause referred to a master, to take, and state to the court, an account of all gains and profits made by the defendants. No report was made by the master, but the following entries were made upon the docket: "May 27th. Master's certificate upon settlement of interrogatories, with state of facts, and schedule filed." "Roll containing nine drawings filed with certificate." "May 31st. Exceptions to master's certificate and report filed." *Ordered*, that the filings entered by the clerk be stricken out, and that the several papers filed be returned by the clerk to the master.

Explanation of the correct practice in this circuit, where a cause has been referred to a master to state an account.

In case the decretal order was ambiguous, the master might have authority to report the case back for more specific instructions.

The court might have power to revise each act of the master, as it progressed, but such a practice would be productive of delay, and will not receive countenance from the court.

When a suit in equity has been heard, neither party has a right to file any paper in the cause, except by leave of court.

The correct method is, for a master, if possible, to complete his investigations under the rules, make up his draft report, file it in the clerk's office, and give time for the parties to make their objections thereto.

THE decree in this case was as follows : —

It is ordered, adjudged, and decreed that the letters-patent, dated January 27, 1863, granted to the complainant as assignee of Gustavus A. Jasper, for an improvement in purifying and cleansing sugar, is a good and valid patent; that said Jasper was the original and first inventor of the improvements therein described and claimed; that the defendant has infringed upon the said patent and the exclusive right of the complainant thereunder; that the complainant recover of the defendant all gains and profits by him made from his infringement of the said patent by his unlawful using of the patented invention in purifying and cleansing sugars, at any time since January 18, 1864; that the complainant recover of the defendant his costs and charges in this suit to be duly taxed; that it be referred to George S. Hillard, Esquire, one of the masters of this court, residing in the city of Boston, to take and state to the court an account of

all such gains and profits made by the defendant as aforesaid ; that the complainant in such accounting have the right to cause an examination of said defendant *ore tenus*, or otherwise, and also the production of all books, vouchers, and documents relative and pertinent to such accounting ; and that said defendant attend for such purpose before said master, from time to time, as said master may direct ; also, that an injunction according to the prayer of this bill be issued against the said defendant, to stand until the further order of this court.

*B. R. Curtis, Chauncey Smith, George H. Preston, C. W. Huntingdon*, for complainant.

*E. W. Stoughton, Robert Gilchrist, Jr., Causten Browne, A. C. Washburn, W. P. Walley*, for respondent.

CLIFFORD, J. Strong doubts are entertained whether the case is properly before the court, under circumstances which will authorize it to make any order therein. The cause went to final hearing upon pleadings and proofs, and the conclusion of the court was expressed in the decree entered on the occasion. The substance of the decree was, that the inventor was the original and first inventor of the improvements described in the patent ; that the defendant had infringed upon the patent ; that the complainant should recover of the defendant all gains and profits made by him from his infringement of the patent, by his unlawful use of the invention, in purifying and cleansing sugar, after the time alleged in the bill ; that the cause be referred to a master, to take, and state to the court, an account of all such gains and profits made by the defendant ; that the complainant in such accounting should have a right to cause the examination of the defendant *ore tenus*, or otherwise, and also the production of all books, vouchers, and documents relative and pertinent to such account ; and that the defendant attend for such purpose before the master from time to time as the master may direct.

No report has been made by the master, but we find upon the docket the following entries : —

“ May 27th. Master’s certificate upon settlement of interrogatories with state of facts and schedule filed.” “ Roll con-

taining nine drawings filed with the above certificate." "May 31st. Exceptions to master's certificate and report filed." These are all the entries that need to be referred to at this time.

When a suit in equity has been heard and submitted to the court for decision, neither party has a right to file any paper in the cause except by leave of the court. Such prohibition commences at the date of the submission of the cause to the court, and continues throughout the period that it remains upon the docket thereafter. The master may report back the cause to the court at any time when he has completed his investigations; and it would be the duty of the clerk to allow him to file his report without any new order from the court, as the right to do so is implied from the decree, referring the cause to him for the purpose specified in the decree.

No report has been made in this case by the master, although the docket entry describes the first paper filed as the "master's certificate upon the settlement of interrogatories, with statement of facts and schedule." Referring to the paper, it appears that the master, upon settling certain interrogatories to be propounded to the defendant, made the following memorandum in his own office: "May 22, 1867. Upon argument, the above interrogatories are settled and allowed, and state of facts setting forth the defendant's objection to the interrogatories are herewith filed, marked 'A,' with my initials and with this date" (signed by the master). Nevertheless it is true that no report of the case has been made by the master to the court; and the cause is still pending before the master. Our impressions are, that the proceeding is irregular, and, if allowed, would work very considerable inconvenience. Besides, we are of the opinion that it is a departure from the usual course in equity suits, at least in this circuit. We are not, however, inclined to place our decision entirely nor even chiefly upon that ground on the present occasion.

The better practice, as the court thinks, is for the master to complete his investigations under the rules prescribed by the Supreme Court, and in accordance with the usual course of pro-

ceeding in equity cases in this circuit. The usual course is, that the master allow both parties, if they desire, to introduce testimony upon the subject of damages. He hears them fully, and when he has taken all the testimony, heard the parties, and come to a conclusion, he makes a draft of his report in the premises, and shows it to the parties, or files it in the clerk's office, and gives time for the parties respectively if they see fit, to make their objections to the drafted report. When those objections are made, it becomes his duty to consider or reconsider, as the case may be, the questions involved in those objections; and if, upon full consideration, he is still of the opinion that he was right in the conclusions formed and stated in the drafted report, he then makes his final report, and the parties have a right to file their exceptions to the final report, founded upon the previous objections made to the draft report, and then the whole matter comes back to the Circuit Court for adjudication upon the master's report. Either party may set down the case for hearing upon the exceptions to the master's report. Both parties may except; both may object in the first instance to the draft report, and both parties may afterwards except to the final report. They are entitled to be heard upon all the questions which have arisen before the master, provided they are embraced in their objections and in their exceptions.

When the exceptions are filed, if either party desires the evidence to be reported, they request the master to report it in whole or in part, as the case may be. It is the usual course for the master to comply with such a request; but if neither party makes the request, it is not incumbent upon the master to report the evidence at all. He may or may not, in his discretion, as he sees fit. If he does report the evidence at the request of one or both parties, it then becomes the duty of the court, if there be proper exceptions, to review the questions of fact embraced in the report as well as the questions of law. But, if the evidence is not reported, the court does not review the facts, but simply re-examines the questions of law. Such has been the practice in this circuit as far back as the knowledge of the justices now holding the court extends; and there has been no departure

from the practice, since either of us came into the court, within the recollection of either member of it.

Authorities are referred to, very properly, by the respondent in this case as showing that exceptional cases have occasionally arisen, which support the course adopted on this occasion as a correct course. Our attention has been drawn to those cases, more especially to those referred to in the Circuit Court reports of this circuit; but we think they do not sustain the course adopted in this case. One of the cases, which was a suit at law, contains some remarks of Judge Story, which at first reading might seem to afford some countenance to the supposed right of a party to bring back from a master questions arising there for the preliminary consideration of the Circuit Court. That was, as before remarked, a suit at law. It was a case of interrogatories and cross-interrogatories filed in the clerk's office under the rules regulating the taking of testimony in suits at common law. The usual course of practice in that class of cases has been for the party objecting to any interrogatory to note his objection under the interrogatory and to allow it to go, reserving the question for the consideration of the court in case the deposition should be taken and duly returned and offered in evidence at the trial; but it must be admitted in that case that the interrogatories were reported to the court, were before the court, were presented to the court, and received the consideration of the presiding justice. Looking at his remarks, however, it is quite clear that nothing practically useful to either party would possibly grow out of adopting the course there pursued as a general rule of practice, because Judge Story held that he would look at the interrogatories, and, if they presented any question of doubt, he would decline to decide it, and would postpone the matter until the trial, when the parties could be heard, and when they could save their rights by exceptions; and if, upon looking at the interrogatories, they were manifestly immaterial or incorrect, he would correct the error. Two things are very clearly to be inferred from those observations: first, the judge would not examine them unless they were plainly incorrect or immaterial, and then, if he did examine them at that



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stage of the case, and made any correction, the parties would be without remedy, as perhaps it is obvious they would be. Exceptions can only be taken in common-law suits at the trial. They must be made before the jury retire; they must be reduced to writing; they must be sealed by the judge. They may be drawn out after the jury has retired; but they must be taken during a trial, noted on the minutes of the judge, and subsequently drawn out and sealed by the judge, or they have no validity, and will not be examined in the appellate court. Taken as a whole, therefore, our conclusion is, that that decision does not furnish any substantial support to the views of the respondent in this case.

We are inclined to go a step further in respect to that decision, that it may not be a subject of misapprehension hereafter. Some inquiries have been made, and we cannot find that any such general practice has ever prevailed in the circuit. Indeed we learn of no other case of the kind. No such practice prevailed in the time of my predecessor, as I learn, and nothing of the kind since I have been in court, a period now of ten years; but the uniform course has been to allow the party to go to the clerk's office, and make his objections under the interrogatories, and save all his rights to be decided by the court at the trial. Otherwise the court would be settling moot questions very frequently, as it often happens that interrogatories are filed, and the deposition never taken, and perhaps it still oftener happens that they are filed, and the deposition taken, but so irregularly taken that it cannot be received in evidence. It is only necessary to settle those questions when the deposition has been taken, is offered in evidence, and is in a condition to be admitted to the jury; then the question arises, what portion of the statements of the deponent are proper evidence and have been properly taken?

Some other cases have also been cited, one in which the master in a chancery suit, the late Professor Greenleaf, made a certificate of the questions which arose, the interrogatories, and the matters were reported to Judge Story. The master expressed the opinion that the deposition ought to be taken (I refer to the



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case of *Gass v. Stinson*), and the case shows that Judge Story ordered the commission to issue. The interrogatories in that case were to witnesses, not to either of the parties; and the master in chancery, apparently entertaining some doubt, sent the matter to the judge at chambers, because under the rules of that day the order for the commission must go from the court; there being in chancery suits no provisions for its issue by the clerk, which at a later period the rules authorized the clerk to make in common-law suits. The conclusion of the court in that case, although affording more countenance to the course adopted in this than any case the court has examined, is not sufficient to sustain the practice.

In fact our conclusion is, that in general the practice heretofore pursued and described by the court is the correct practice in equity suits, and is the general course of practice that the court will require to be followed, unless in some very special cases.

We do not decide that if the decretal order was ambiguous and indefinite, or incomplete, the master might not have authority to report the case back for more specific instructions. We do not express any decided opinion upon that point, because the case is not before us. In this case there is no suggestion that the decretal order is not sufficiently comprehensive, and if the suggestion was made our conclusion is that it could not be sustained. The decretal order is in the usual form in this class of cases, and contains the several allegations which the court have required to be inserted in such orders after a good deal of consideration.

Three times this court itself has corrected a decretal order because it was ambiguous, — twice in this district and once in the Rhode Island District, in a case where a very large amount was involved. The report of the master there was in favor of the complainant; but upon looking at the decretal order when the report came in, the court saw that one of the clauses of the order was quite ambiguous, and, perceiving that its phraseology had escaped the attention of the court at the time, the court of its own motion corrected the decretal order by a new order, and

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recommitted the cause to the master, and the whole subject was revised and a report brought in greatly more satisfactory to the court. The first correction of the kind in this district now resting in my memory was in the case of *Howe v. Williams*, where, through inadvertence in consequence of the first draft having been lost by the counsel, after it had been fully examined and settled by the court, a new draft was prepared, varying its phraseology; and when that case came back from the master, the court, for the first time in this district, corrected, took out the ambiguity from the decretal order, and sent it back to the master. No doubt is entertained of the power of the court in that behalf.

We are not now deciding that the court might not have the power to revise each act of the master as it progressed, provided it was referred back in a formal report by the master. But we do decide that such a practice would be productive of great delays, and will not receive any countenance from the court. My opinion is that the general practice which has been pursued in this circuit is for the interest of all concerned, and until it can be clearly seen that it can be amended to the advantage of the parties litigant, and in a manner to promote the convenience of the court, we must adhere to that practice.

Sudden changes in practice, especially in equity suits, are not advisable. Great care is necessary in equity suits in following closely the rules of the court and the settled course of practice. Otherwise the bar would become confused and the court find itself involved in difficulties far greater than need be, if the regular course of practice is pursued. Some experience at the bar, and more in the courts, in this court and in the Supreme Court, has convinced the presiding justice of the great benefit of a careful adherence to the usual practice in equity suits. They sometimes continue for a considerable length of time; parties de cease, supplemental bills, amendments to bills, and answers, and new proofs, are introduced; and in these different stages, unless there is a pretty close adherence to the known rules of practice, confusion is apt to ensue; and it is hardly necessary to remark that, whenever a case is involved in

confusion, it is embarrassing to the bar, and still more embarrassing to the court.

We feel more satisfaction in announcing this conclusion in this important case, because we are utterly unable to see how the respondent who brings the case here for the consideration of the court, on this occasion, can possibly suffer any ultimate detriment. The power of the court to revise any and every irregularity before the master is full and ample, and can in our view of the matter be best exercised when we have them before us with the whole case. Take any litigation of this volume in evidence and pleadings and it would be quite difficult for the judges to decide an isolated point to their own satisfaction, without looking at the whole or nearly the whole record; as the consideration of one point necessarily must have a bearing greater or less upon other parts of the same record.

We should be exceedingly reluctant to lay down any rule in equity which could embarrass the parties or the bar; but, on the contrary, we do not hesitate to say, if we could see by any new rule we could adopt that there would be less embarrassment to the bar, the parties, and the court, we should adopt such new rule, but our impressions are that innovations ought to be very carefully considered. Even the Supreme Court, in one or two instances, have adopted a rule which they thought to be an improvement, and the probabilities are very strong that they will find it necessary to revise the practice and return to the rules which existed before.

In view of the circumstances our conclusion is, that the filings entered by the clerk be stricken out, and that the several papers filed be returned by the clerk to the master.

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OCTOBER TERM, 1868.

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## ELIZA WALKER, IN EQUITY, v. JOSEPH S. BEAL et als.

The Circuit Court in this district has jurisdiction to grant relief under a bill praying for an account of certain funds received by a testator from the complainant, under a promise to invest the same for the complainant, where the testator died in Rhode Island, and his last will and testament was proved there, but administration was also granted in this State, where the testator left real and personal estate to a large amount.

A husband and wife agreed to live separately. Certain property was transferred by the husband to trustees, to pay the income to the wife, upon condition that she should relinquish her claims of dower to purchasers of such portions of his other real estate as he should sell during coverture; and if she survived him, she should relinquish her right of dower in all the remainder of his real estate. *Held*, such a trust may be upheld in a court of equity.

The agreement of separation in this case was not rendered invalid by the provision for its continuance, should the parties after the making of it elect to cohabit. Neither was it suspended while they lived together. It was evident from the conduct of the parties that they regarded the indenture as operative during their cohabitation.

The indenture in this case was not solely based on separation. Temporary reconciliation and cohabitation did not suspend its operation, because the parties had expressly covenanted that it should not.

Unless it be assumed that the husband cannot be the trustee of his wife, in any case, it cannot be maintained under the indenture in this case that the trust property was wholly discharged of the trust, by the payment of the rents, income, etc. to the complainant, or that these, when paid by her to her husband, became his property.

The husband in this case received from her the rents, income, etc. of the trust property, under an agreement to invest it for her and her children. Such an arrangement made the husband the trustee of the wife.

The complainant was not precluded from setting up her claim by the indenture of compromise, she being a mere formal party to the adjustment, and the purpose of the instrument being to effect an adjustment between the heirs-at-law and the residuary legatees, and there having been no concealment of this claim on the part of the complainant.

Acceptance by the complainant of the provision made for her in her husband's will is not inconsistent with her claim under the agreement of separation, because the declared intention of the testator was, that the amount secured to the complainant in the agreement of separation, coupled with the provision made for her in his will, should be in full for her separate maintenance, and in lieu of dower.

THE complainant was the widow of William J. Walker, of Newport, in the State of Rhode Island, and the respondents were the executors of the last will and testament of the de-

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ceased, as duly constituted under the laws of this Commonwealth.

The introductory allegations of the bill of complaint were, that the complainant, in the month of September, 1845, was the lawful wife of the deceased, and that they both then were, and for many years previously had been, inhabitants of Charlestown, in this State; that at that time and for many months before that time he, the husband, had been guilty of such extreme cruelty towards the complainant, that she ultimately, on or about the 15th of September of that year, was compelled to leave his home, and no longer cohabit with him; that his acts and conduct toward her were such that by the laws of the State she was entitled by reason thereof to prosecute and maintain against him a suit for divorce from bed and board, and to be decreed in such suit a liberal and suitable allowance for alimony; that being about to institute proceedings for such divorce, he, in order to induce her to forbear to carry that intention into effect, and to avoid a decree against him for such alimony, proposed to execute an agreement with the complainant that they should live separate and apart from each other, and to provide for her support and maintenance by a conveyance of real and personal estate to trustees, with power, and whose duty it should be, to appropriate the income thereof for that purpose.

Based upon those introductory averments, the bill of complaint proceeded to allege that the complainant accepted the proposition of her husband, then in full life, and that the indenture embodying the terms of the same, and which was annexed to the bill of complaint, was on the 24th of February, 1846, duly executed by all the parties, including the trustees; that property, real and personal, to the amount therein agreed, was transferred to the trustees therein named, in trust, that they should pay the income of the same to the complainant during her life, upon the conditions therein provided.

By the terms of the indenture they covenanted to live separate and apart from each other during coverture, unless they should thereafter elect to live together, as the provision assumed they might do; and the complainant also agreed, that if her husband

should sell any portion of his real estate during her lifetime, to relinquish to the purchaser her claim of dower in the same, and after his decease to release her dower or right of dower in all his remaining real estate, when thereto requested by his heirs, executors, or administrators.

Subject to these conditions and some others, not material to be mentioned, the complainant accepted the provision, in full satisfaction for her support and maintenance, and of all alimony during coverture, and covenanted and promised that she would at all times thereafter live separate and apart from her husband during coverture, unless they should thereafter mutually agree to live together. But the express provision was, that if they "shall at any time or times hereafter cohabit and live together as heretofore, these presents shall not thereby be rendered invalid." On the contrary, the stipulation was, that the trusts therein contained should in that event be executed in like manner as if they should live separate and apart.

Pursuant to that indenture they separated, and the complainant lived apart from her husband from the date of the instrument until the month of April, 1846, when at his request, as she alleged, she returned to live with him, and continued to live with him until the month of June, 1860, when she was compelled by his cruel and harsh treatment of herself and daughter to cease to live with him, and ever after during his life continued so to live separate and apart.

Due conveyance was made of the described real and personal property to the trustees, and they covenanted in the same instrument that they would collect the rents, interest, and income of the same, and cause to be paid out of the trust property, rents, interest, and income, all debts which the complainant might thereafter contract, and after deducting all necessary and proper charges and expenses, to pay annually or oftener the residue of the rents, interest, and income to the complainant during her natural life, for her sole and separate use and benefit, and upon her own order and receipt in writing.

The execution of the indenture was admitted, and it was not controverted that the persons named as trustees in the instru-

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ment accepted the trust, and continued to execute the same during the lifetime of the husband, until his death. They collected the rents, interest, and income as covenanted, and the proofs showed that in every instance, except the first, they gave the check for the net amount to the complainant. When they were about to make the first semiannual payment, the proof was, that the husband presented an order from the complainant for the amount, and it appeared that the money was paid to him, under that order, he stating that he had advised the complainant to allow him to invest the money for her use and benefit. The subsequent payments, however, throughout the entire period of the controversy, were without exception made to the complainant.

The payments were made in checks, and the proofs show that the checks were always received by the complainant, and that she gave the proper receipt.

The allegation of the bill of complaint was, that the complainant, at the suggestion of her husband, and upon his agreement to invest the several amounts so received by her from the trustees for her benefit and that of her children, delivered the checks to him, and that he semiannually received the same from her, as they came to hand, promising at all times to make the investment, as he had originally agreed. The proof of the several payments substantially as alleged was full and satisfactory, as they appeared in a schedule, signed by the complainant, and found among the papers of the deceased, which passed into the hands of his executors.

Satisfactory proof, also, was exhibited of the agreement of the husband to make the investment, as alleged in the bill of complaint. The agreement was fully proved by the uncontradicted statements of two credible witnesses, whose testimony was corroborated by the exhibit in the case, which the answer of the respondents admitted was found among the papers which came into their hands as executors of the last will and testament of the deceased.

*B. R. Curtis, S. Bartlett, and Francis Bartlett, for complainant.*



By the articles the agreed amount of property was transferred to trustees in trust, to pay its income to Mrs. Walker during her life, upon condition that she should release her possibility of dower in any and all real estate her husband might sell during his lifetime ; and, if she should survive him, that she should release her right of dower in his estate. The settlement, therefore, was made by him, and accepted by her, not merely in lieu of alimony which she could have had decreed to her out of his then large estate, and as being about the amount he had received in her right from her father's estate, but in place of her dower. And, therefore, it was expressly stipulated that if the parties should at any time or times thereafter cohabit together as heretofore, these presents shall not be thereby rendered invalid ; but the trusts herein contained shall be executed (subject to the conditions as to her release of dower) in like manner as if the parties should live separate.

It is settled law that such a trust, either with or without the covenant of the trustees to indemnify the husband against the wife's debts, is founded on valuable consideration ; is valid, and is not terminated by the subsequent cohabitation of the parties. *Compton v. Collinson*, 2 Bro. C. C. 377 ; *Worrall v. Jacob*, 3 Meriv. 266 ; *Jee v. Thurlow*, 2 B. & C. 547 ; *Wilson v. Mushett*, 3 B. & Ad. 743 ; *Webster v. Webster*, 23 Eng. Law & Eq. 216 ; and 17 Eng. Law & Eq. 278 ; *Rundle v. Gould*, 8 El. & Bl. 457 ; *Babcock v. Smith*, 22 Pick. 61.

The separation having continued some months after the execution of the articles, Mrs. Walker returned to her husband at his request, as he expressed it, " as a visitor or guest."

While so living together the transactions took place out of which arose the trusts on which this bill is founded.

It is clear that a husband may be a trustee for his wife. All that is necessary is that he should agree to become so, and although the agreement be made between him and her alone, the trust will attach upon him in the same manner and under the same circumstances that it would if he were a mere stranger. 2 Story's Eq. § 1380 ; *Neves v. Scott*, 9 How. 212.

Such agreement imposes the character of a trustee on the



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husband even when there is no valuable consideration, and it is made concerning property belonging to him. *A fortiori* when there is a valuable consideration, and it is made concerning her separate property. 2 Kent Com. 163, and cases cited; *Woodward v. Woodward*, 8 Law Times, N. S. 749; *Grant v. Grant*, 9 Law Jour. N. S. 802; 2 Law Times, N. S. 721.

Applying these principles to the facts proved by the evidence in the record, it is clear that the husband took from his wife her income, which was her separate estate, under an express agreement to invest it for her use, and made himself her trustee for that purpose.

The objection that the suit should have been brought in Rhode Island is untenable.

The scope of the bill is to charge the estate of the defendant's testator with a trust, and to procure a decree in favor of the complainant as a creditor, for that sum of money which may be found due to her on an account of such trust.

The contracts out of which the trust arose were all made in Massachusetts, between persons then domiciled here.

The Circuit Courts of the United States, as courts of equity, have jurisdiction over executors and administrators, when the parties are citizens of different States. *Green's Administrator v. Creighton et al.*, 23 How. 90. And they administer the equity law recognized by the Constitution, and not the merely local law of any State. *Neves v. Scott*, 13 How. 272, and cases there referred to; *Harvey v. Richards*, 1 Mas. 381.

*B. F. Thomas* and *H. C. Hutchins*, for respondents.

There is, defendants submit, no real equity to support the plaintiff's claim.

The indenture of trust was made, as plaintiff expressly alleges, to provide for the support and maintenance of the plaintiff, and the income was to be "devoted to that purpose."

Mrs. Walker accepted the provision for her support and maintenance.

Her claim now is for the income of the fund during the period of reconciliation, when the plaintiff was living with and wholly supported by her husband; when she got precisely that which it was the object of the indenture to secure.

The plaintiff says she ought to have both support and income.

The claim is made at a time, and under circumstances, which cannot fail to excite the deepest suspicion and distrust. Fry on Specific Performance, 155 ; *Colson v. Thompson*, 2 Wheat. 336.

It is first made twenty years after the oral promises are alleged to have been made.

It is made, for the first time, after the death of Dr. Walker.

Not till after the death of her husband, not till after her interest is secured under the will, not till after the compromise between the heirs-at-law and the residuary legatees, to which she was a party, is this claim set up.

The making of the promise upon which the bill rests is not so clearly established that a court of equity will enforce it.

The agreement contained in the indenture of separation must stand, if at all, as a voluntary agreement of husband and wife, to live separately and apart from each other during their coverture. It is expressly so declared in the written contract.

The plaintiff and her husband resided in Massachusetts when the agreement for separation was made, the indenture executed, and the moneys delivered, for which the plaintiff seeks to recover. The validity of the contract and the effect of the payments must therefore be determined by the law of Massachusetts.

This indenture of separation would not, we submit, have been upheld and enforced by the courts of Massachusetts.

The question affecting the marriage relation, and its rights and duties, is peculiarly one of State policy, of the *lex loci*. Story on Con. of Laws, §§ 276, 280 ; *De Conche v. Saratur*, 3 Johns. Ch. 190 ; *Blanchard v. Russell*, 13 Mass. 1 ; *Anstruther v. Adair*, 3 Myl. & K. 513.

Though the invalidity of articles of voluntary separation between husband and wife has not been the subject of express decision in Massachusetts, the recent tendencies and premonitions of the cases are all in that direction. See, among others, *Ames v. Chew*, 5 Met. 320, 323 ; *Albee v. Wyman*, 10 Gray, 222.

The recognition of their validity has been deeply regretted, whenever and wherever made. *Lord St. John v. Lady St. John*, 11 Ves. 526, 536, 537 ; 2 Story's Eq. Juris. 1427, 1428 ; *Evans*

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v. *Evans*, 1 Hag. 35 ; *Joe v. Thurston*, 2 B. & C. 547 ; *Durant v. Tilley*, 7 Price, 577.

If the agreement was not void, it was annulled or suspended during the period of the reconciliation and the cohabitation of the parties thereto ; because the agreement was based on separation, and, by the reconciliation, new obligations arose inconsistent with separation. *St. John v. St. John*, 11 Ves. 526 ; Shelford on Marriage and Divorce, 629 ; *Hunter v. Bryant*, 2 Wheat. 32 ; *Westmeath v. Salisbury*, 5 Bligh, N. R. 339 ; Clancey on Husband and Wife, 414 ; *Fletcher v. Fletcher*, 2 Cox, Ch. 99 ; *Jee v. Thurlow*, 2 B. & C. 550 ; *Westmeath v. Westmeath*, 1 Dow. & Cl. 519 ; Bright's Husband and Wife, 349 ; *Hindley v. Westmeath*, 6 B. C. 200 ; *Wells v. Stout*, 9 Cal. 479 ; *Heyer v. Burger*, Hoff. Ch. 1 ; *Shelthar v. Gregory*, 2 Wend. 422 ; *Slatter v. Slatter*, 1 Yo. & Coll. Exch. 28, 35 ; *Webster v. Webster*, 17 Eng. Law & Eq. 278.

The provision of the indenture of separation, that subsequent cohabitation should not render the agreement invalid, does not control the disposition of the income, while the plaintiff received her support and maintenance under her husband's roof and out of his money. The actual maintenance by the husband, the parties living together, was a satisfaction in equity of the agreement that the income of the trust fund should be devoted to that purpose. *Hunter v. Bryant*, 2 Wheat. 32.

A court of equity will not require the husband to account for the income of the separate estate of his wife, which the husband, with the consent of his wife, has been accustomed to receive. 2 Story's Eq. Juris. § 1396 ; *Hunter v. Bryant*, 2 Wheat. 32 ; *Squire v. Vean*, 4 Brown C. C. 326.

The income of the trust fund, when paid to the complainant by the trustees, became wholly discharged of the trust. The trustees had fully performed their duty in relation to it ; and the money thus paid to her as income, when paid by her to her husband, became, by the laws of Massachusetts then in force, the property of her husband. *Allen v. Wilkins*, 3 Allen, 321 ; *Lord v. Parker*, 3 Allen, 129 ; *Edwards v. Stephens*, 3 Allen, 315 ; *Ingham v. White*, 4 Allen, 412.

The acceptance by the complainant of the provision made for her in the will of her husband is inconsistent with the claim she now makes.

CLIFFORD, J. The reasonable inference from the agreement is, that it was executed at the request of the husband, and that it was kept by him as a voucher to show that certain sums were to be deducted from the amounts received by him from the complainant, as the net rents, interest, and income of the trust property. Viewed in that light, the paper affords strong confirmation of the testimony of the daughter, and of the trustee, whose deposition is in the record.

The prayer of the bill of complaint is for an account, and it is very clear that it ought to be granted, unless the defences, or some one or more of them, as set up in the answer, can be sustained.

The respondents object, in the first place, that inasmuch as the testator had his domicile in the State of Rhode Island, at the time of his decease, the Circuit Court here has no jurisdiction to grant the relief prayed for in this case. Undoubtedly the fact is, that the testator died at Newport in that State, and it appears that his last will and testament was duly proved in the State of his domicile, but the answer admits that administration was also granted here, and that the testator left in this State, as well as the State of his domicile, real and personal estate to a large amount. Insolvency is not suggested even in argument, and the sufficiency of the assets here is abundantly proved. The settled law of this State is, that the assets received and inventoried by the executors here are liable, under such circumstances, to the just claims of the citizens of the State, to the full amount. *Richards v. Dutch*, 8 Mass. 506 ; Gen. Stat. 508, § 39 ; *Dawes v. Heard*, 3 Pick. 127.

Citizens of other States also, where it appears that the estate is solvent, may by proper proceedings in the Circuit Court of the district enforce their claims against such assets, as it is well settled that those courts, as courts of equity, have jurisdiction over executors and administrators, in such a case, where the parties are citizens of different States. *Grain's Administrator v. Creighton et al.*, 23 How. 104 ; *Harvey v. Richards*, 1 Mas. 381.

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Coming to the construction of the indenture, the primary suggestion of the respondents is, that it is merely a voluntary agreement of husband and wife to live separately and apart from each other during coverture; but it is quite evident that the proposition cannot be sustained. Irrespective of the parol testimony, it appears by the terms of the indenture that the trust property was granted and transferred to the trustees, upon the condition that the complainant should accept the provision, as a full consideration for her covenant to relinquish all claims of dower to purchasers of any portion of his real estate, if sold during coverture, and to release her right of dower to his heirs, executors, or administrators after his decease. The terms of the instrument also required that she should accept the trust provision as a full satisfaction, not only for her support and maintenance, but also as a full satisfaction of all alimony whatsoever during her coverture. The legal effect of the covenant to live separate and apart is, that they would continue so to live, unless they should thereafter elect to live together; but they mutually covenanted with each other that if they should thereafter cohabit and live together, the indenture should not thereby be rendered invalid, but that the trusts should be executed, subject to the conditions as expressed, in like manner as if they should live separate and apart. The intention of the parties clearly was, that the effect and operation of the indenture should continue during coverture, without suspension or interruption, and without the possibility of its becoming invalid, except upon breach of condition. Suppose that be so, still it is insisted by the respondents that the indenture is void, as a mere voluntary agreement to live separate and apart, because, as they contend, the proof of consideration as alleged in the bill of complaint is insufficient and unsatisfactory. The statement of the answer upon that subject is, that the respondents are ignorant whether or not their testator entered into the indenture for the reasons alleged in the bill of complaint, and therefore they can neither admit nor deny those charges. The express allegation of the bill of complaint is, that the husband prior to the date of that instrument had been guilty of such extreme cruelty to his wife that

she was entitled to a divorce from bed and board, and to a liberal allowance for alimony.

Cruel treatment is proved by the daughter, in unmistakable terms, if she is to be believed. When asked whether he was kind, or otherwise, to her mother, she answered that she did not remember the time when he did not treat her mother cruelly; and she proves that the complainant received personal violence from her father, and that he compelled the mother and daughter to leave his house, without any just cause. Unless the witness can be considered as impeached, or in some way discredited, the introductory allegations of the bill of complaint are fully proved. Careful attention has been given to the inquiry, and the court has not been able to perceive any just grounds to hold that the witness is not entitled to belief.

Satisfactory proof has been exhibited in the record derived from the testimony of another witness that the husband confessed that his wife had left him just before the date of the indenture, and that she had employed counsel to obtain a divorce and separate maintenance. Passages also in the indenture, and in the last will and testament of the deceased, afford confirmation of the statement of the witness; and the conclusion of the court is, that the witness is not discredited.

Courts of equity have for a great length of time refused to acknowledge the common-law rule that a married woman is incapable of taking real and personal estate, and holding the same to her own separate and exclusive use. Arrangements of the kind are usually made through trustees, appointed for the purpose, to whom the property real and personal is conveyed, for her sole and exclusive use, but it has long been settled that the intervention of trustees is not indispensable. Whenever real or personal property is given or devised or settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the rule in equity is, that the intention of the parties shall be carried into effect, and that the wife's interest shall be protected against the marital rights and claims of the husband, and also those of his creditors. 2 Story's Eq. Jur. 1380.

Here the property was transferred to trustees in trust, to pay the income to the *cestui que trust*, upon condition that she should relinquish her claims of dower to purchasers of such portions of his real estate as he should sell during coverture ; and if she survived him, that she should release her right of dower in all the remainder of his real estate. Such a trust, it is insisted by the respondents, cannot be upheld in a court of equity, but the court is not able to concur in that proposition. The views of the respondents appear to be, that the indenture, even if considered as divested of the clause which provides that it shall not be rendered invalid, should the parties thereafter cohabit and live together, is nevertheless void, as contrary to public policy. Objections of that sort have frequently been urged, but they have as often been overruled as they have been presented for consideration. Regrets have been expressed by judges that the rule had not been settled otherwise ; but as often as the question has been presented in the later cases, another decision has been added to the list confirming it, until it may be said that it is universally established. *Compton v. Collinson*, 2 Brown C. C. 377 ; *Worrall v. Jacob*, 3 Mer. 266 ; *Jee v. Thurlow*, 2 B. & Cr. 546 ; *Webster v. Webster*, 23 L. & Eq. 216 ; *Wilson v. Marhat*, 3 B. & Ad. 743 ; *Rundle v. Gould*, 8 El. & Bl. 457 ; *Babcock v. Smith*, 22 Pick. 61 ; *Hunt v. Hunt*, 5 Law Times, 778.

Special objection is made to the provision of the indenture, that it shall not be invalid in case the parties should hereafter elect to cohabit and live together, as withdrawing all motive from the husband for a reconciliation and return of his wife. Doubt cannot be entertained as to the intention of the parties. Where the instrument contains no such clause, it might well be argued that it was not the intention of the parties that it should continue in force in case of subsequent cohabitation, but every such suggestion is shown to be groundless by the terms of this instrument. Equally groundless is the suggestion that it was suspended during the period the complainant lived in the house with her husband, whether she lived there as agent, or as the wife of her husband. She returned to live with her husband at his request, and it was while they were so living together that



the payments of the rents, interest, and income of the trust property were made, and that the checks for the same were received by the husband, as alleged in the bill of complaint. *Webster v. Webster*, 4 De G. M. & G. 437.

The clear inference from the conduct of both parties is, that they alike regarded the indenture as valid and operative, and the conduct of the trustee speaks the same language. The error of the argument for the respondents consists in the assumption that the indenture was solely based on separation. Granting that theory, there would be great weight in the argument, but the court has endeavored to show that the indenture cannot properly receive that construction. Temporary reconciliation and subsequent cohabitation did not so annul or suspend the operation of the instrument, because the parties had expressly covenanted that it should not, and the trust properly remained, affected by that covenant. *Rundle v. Gould*, 8 El. & Bl. 457.

Such being the fact, it is quite clear that none of the authorities cited to the point, by the respondents, have any proper application to the case.

The next proposition of the respondents is, that the rents, interest, and income of the trust property, when paid to the complainant by the trustees, became wholly discharged of the trust, and that the money thus paid to her, as rent, interest, and income, when paid by her to the husband, became the property of the husband. When the payments were made to the complainant, the several sums, as the proposition concedes, were so paid on account of, and for the net rents, interest, and income of the trust property.

The next point made is, that the rents, interest, and income became discharged of the trust when the husband was suffered by the wife to receive the checks and to collect the money. Unless it be assumed that the husband cannot be the trustee for his wife in any case, the proposition ought not to be sustained, as it would give effect to a positive fraud. Delivery of the checks was made to him, in every case, upon his unconditional assurance that he would invest the money for her benefit and that of her children, and in the belief induced by his own rep-

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representations that he was more competent to transact business than the wife, to whom the funds belonged.

But the husband may be trustee for his wife of gifts to her from others, or of the rents, interest, and income of property given by himself to her in trust, and lawfully held by trustees, for her sole use and benefit. 2 Story's Eq. Jur. 1380 ; 3 Kent Com. 163.

Gifts from the husband to the wife may be supported as her separate property, if they be not prejudicial to creditors, even without the intervention of trustees. *Nevers et al. v. Scott et al.*, 9 How. 22 ; *Rundle v. Gould*, 8 El. & Bl. 457 ; *Woodward v. Woodward*, 8 Law Times, n. s. 749 ; *Grant v. Grant*, 12 Law Times, n. s. 721 ; *Riley v. Riley*, 25 Conn. 154 ; *Turner v. Nye et al.* 7 Allen, 181 ; *Wallis v. Stone*, 9 Cal. 479 ; *Dallinger's Case*, 35 Penn. St. 357.

All the checks came from the trustees as payments for the rents, interest, and income of the trust property, and the proof is entirely satisfactory that the husband received the avails, as belonging to the wife, under the indenture, and agreed to invest it for her benefit and that of her children. Such arrangement imposes on the husband the character of trustee, especially in a case where it is concerning her separate property, and where to hold otherwise would sanction misrepresentation and fraud. Consent of the complainant that her husband should receive the checks, and collect the money as his own property, was never given, and he never received the money with any such understanding. Bell on. H. & W. 525, 526, 531, 534.

Should the court overrule those defences, the next objection of the respondents is, that the complainant is precluded from setting up the claim, by the indenture of compromise. But the answer made by the complainant to the proposition is decisive. She was a mere formal party to the adjustment, and it concerned only the residue of the estate, after the payment of all debts, liabilities, and legacies. The purpose of the instrument was to effect an adjustment between the heirs-at-law and the residuary legatee, and as there was no concealment of this claim on the part of the complainant, the defence of estoppel is not maintained.

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The only remaining objection is, that the acceptance by the complainant of the provision made for her in the will of the husband is inconsistent with the claim she now makes; but the court is not able to adopt that conclusion, or perceive that it finds any support in the provisions of the will. On the contrary, the declared intention of the testator was, that the amount secured to his wife in the indenture, coupled with the provision made for her in his will, should be in full for her separate maintenance, and in lieu of dower.

Our conclusion is, that none of the defences set up in the answer can be sustained, and that the complainant is entitled to a decree for the amount.

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If the respondent have no personal knowledge of the matter set forth in any particular allegation of the bill of complaint, a denial by the respondent upon information and belief is sufficient to make it necessary for the complainant to prove the same.

The obvious purpose of the act of July 16, 1862, as to the competency of witnesses in the United States courts, was to bring the State and Federal courts into a more harmonious course of decision upon this subject.

The effect of the act of July 2, 1865, was to produce diversity between the rules of decision, in the State and Federal courts.

By the act of March 3, 1865, it is provided, that neither party shall be allowed to testify against the other, under the circumstances described in the act, unless called by the opposite party, or required to testify by the court.

The several acts of Congress, as to the competency of witnesses, indicate an intent upon the part of Congress to legislate that evidence of title to real estate and rules of decision in all controversies affecting rights of property shall be the same in the Federal and State courts of the same State and district.

Where an executor or administrator is a party under the law of this State, the other party cannot be admitted to testify in his own favor, unless the contract was originally made with a party who was living, and competent to testify, and therefore the complainant in this case was not a competent witness to testify to any transaction with, or statement by, the testatrix.

Equity acknowledges the rule that a representation made by one party for the purpose of influencing the conduct of the other party will in general be sufficient to entitle such other party, if induced to act upon such representation, to relief.

Such representations must be proved by the party who alleges they were made.

In this case it was *held* that the alleged contract that the complainant and Sylvia Ann Howland were to exchange wills, and neither to make any new will, without first returning to the other the will thus received, was not proved.

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Where two persons agree to make mutual wills, and both execute the agreement, it is *held* that neither can properly make a will without notice to the other.

Equity only interposes to enforce the agreement.

In this case there was no competent evidence to show that there was any agreement as to the making of mutual wills, and there was nothing on the face of the instruments to warrant any such conclusion.

THIS was a bill in equity, setting up a special contract for an exchange of wills between the complainant and Sylvia Ann Howland, and that neither should make any other will without notice to the other, and the return of other's will. Complainant alleged that she was the niece and sole heir-at-law of Sylvia Ann Howland, deceased, leaving a will disposing of her estate; that in the month of September, 1860, she, the complainant, was possessed in her own right of property derived from her mother, who was the sister of the testatrix; that her aunt, then in full life, was at that time at variance with the father of the complainant, and was desirous of excluding him from inheriting, by will or otherwise, from the complainant any part of the property she so derived from her mother, and to exclude him, in case she, the complainant, should survive her aunt, from inheriting any part of the property that she, at the decease of her aunt, should derive from her aunt's estate. Actuated by those motives, the bill of complaint alleged that the said Sylvia Ann at the same time requested the complainant to make a will disposing of her estate, so that in case of her decease before her father, he should not in any manner, by will or otherwise, inherit any part of the property so derived, or to be derived, and promised the complainant, if she would comply with the request, that she, the decedent, would make her will in favor of the complainant; and the allegation was, that it was at the same time mutually agreed between the parties that the respective wills, so to be made, were to be exchanged, and that each was to have possession of the will of the other, and that neither was to make any other will without notifying the other, and returning the other's will so to be held in exchange.

Performance of the agreement on the part of the complainant was also alleged in the bill of complaint.

The substance and effect of those allegations was, that the

complainant, in pursuance of her promise, did, on the same day, make and execute a will in due form, by which all the property she then had, or might thereafter acquire, was given and devised to her issue if any, and in default thereof to charitable uses, and that she did thereby exclude her father from all benefit from the will, as specially requested by her aunt, so that in event of her decease before her father, he would not, by inheritance or otherwise, be entitled to any part of her estate; that the will so made and executed was delivered to her aunt, by whom it was kept during her lifetime, and among whose papers it was found after her decease.

Part performance of the contract on the part of the said Sylvia Ann was also alleged, to the effect that she at the same time, in conformity to her promise, caused a draft to be made of her own will, which was not then completed; but the averment is, that the completion of the same was postponed, with the clear understanding that the will so drawn should be executed and delivered to the complainant under the agreement, whenever she should request the same to be done; and she also averred that she did afterwards make that request, and that the said Sylvia Ann did, on the 11th of January, 1862, complete, sign, and duly execute that draft, as her last will and testament; that before executing the same she signed the paper writing therein called the second page of the will, and that the same was attached to the will before the will was so signed and executed. Delivery of the will so made and executed to the complainant, in pursuance of the agreement, was also alleged, with the paper writing thereto attached; and the complainant averred that the will so made and delivered to her remained in her possession, and that her own will was never returned to her, and that she was not at any time or in any way ever notified that the said Sylvia Ann had made or was about to make any other will.

The alleged breach of the agreement was, that notwithstanding her promises, the said Sylvia Ann did make another will, bearing date September 1, 1863, appointing therein the first-named respondent as executor, and also made a codicil to the same bearing date November 18, 1864, giving and devising a large

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part of her property to divers persons and corporations, to the exclusion of the complainant, and that she gave and devised the residue of her estate to the other three respondents, in trust, to pay the income thereof to the complainant during her life; and that she made no other provision for the benefit of the complainant, and none whatever for her issue; and that she afterwards on the 2d of July, 1865, deceased, possessed of large real and personal estates.

The prayer of the bill of complaint was, that the first-named respondent, as executor, might be declared to hold the personal estate in trust for the complainant, and that the other respondents might be declared to hold the real estate in trust for her benefit, and that all the respondents might be decreed to account with her, and to deliver to her all the real and personal estate of the deceased.

The respondents admitted that the complainant was the niece and sole heir-at-law of Sylvia Ann Howland, but they denied that the latter was at variance with the father of the complainant. They not only denied that any such motive existed for the alleged request, but averred that the complainant herself was at variance with her father, and that she had repeatedly declared that she would make her will, and keep her father from "receiving any portion of the property she had derived from her mother."

Specific reference was also made in the answer to the several allegations in the bill of complaint, in respect to the wills and the alleged agreements, as to the exchange and custody of the same, but it is unnecessary to reproduce that part of the answer, as the respondents alleged that they had no knowledge whatever upon the subject. Unable to answer in that behalf from knowledge, they denied upon information and belief "each and every of said averments in said bill of complaint contained."

*Sidney Bartlett, B. R. Curtis, F. C. Loring*, for complainant.

*B. F. Thomas, T. D. Eliot, T. M. Stetson*, for respondents.

CLIFFORD, J. Evidently the cause of action set forth in the bill of complaint is founded in contract, and consequently the rights of the parties must be ascertained from the pleadings and

proofs as required by the ordinary rules of law and equity applicable in such controversies. Unless the contract is admitted in the answer, the burden of proof in such a case is upon the complainant to prove the same substantially as alleged in the bill of complaint. Where the respondent has no personal knowledge of the matter set forth in any particular allegation of the bill of complaint, a denial by the respondent upon information and belief is sufficient to make it necessary for the complainant to prove the same, and in view of that rule the burden to prove the alleged contract in this case is upon the complainant.

Before proceeding to consider the merits of the case it becomes necessary to determine as a preliminary question whether the complainant is a competent witness in the case in her own favor, and if so, to what extent, and whether her testimony or any part thereof as exhibited in her deposition taken at her request is admissible in evidence to prove the alleged contract. On the 27th of March, 1866, the complainant by petition represented to the court that the interests of justice required, in her belief, that she should be allowed by the court to testify generally as a witness in this case, and prayed that an order to that effect might be passed by the court. Both parties were heard on the subject of the petition, and on the 28th of June, in the same year, the court passed the order against the objections of the respondents, that the complainant might be examined generally as a witness in the cause, reserving the questions as to the competency of the witness and the admissibility of the evidence for further consideration at the final hearing. Pursuant to that reservation the several questions involved in the petition were again discussed by the parties at the final hearing, and the court will now proceed to state their final determination of these several questions, and the reasons upon which that determination is founded.

By the act of Congress of the 16th of July, 1862, it was provided that the laws of the State in which the court shall be held, shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, in equity and admiralty. 12 Stat. at Large, 588. Prior to that time, the only provision in the acts of Congress upon the subject



was that contained in the thirty-fourth section of the Judiciary Act, which provides that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply, but it is well-settled law that that provision does not apply in suits in equity, or in causes of admiralty and maritime jurisdiction. 1 Stat. at Large, 92. Although the Supreme Court decided, in repeated instances, that by virtue of that provision the laws of the States, and the decisions of the State courts, were rules of decision in the Federal courts in common-law controversies affecting the title of property, yet there was some contrariety of opinion whether an act of the State legislature providing that the parties to the suit should be competent witnesses had the effect to qualify them as such in the Federal courts. Undoubtedly the intention of Congress in enacting that provision was to remove that doubt and to require that the rule of decision not only in trials at common law, but in equity and admiralty, should be the same in the Federal courts as in the State courts. The obvious purpose of the provision was to introduce more fully into the Federal courts the rules of decision in respect to all matters of property and local interest, which prevailed in the State courts, and to bring the several courts of the Federal and State governments into a more uniform and harmonious course of decision upon all such subjects.

The next provision in the acts of Congress was that passed on the 2d of July, 1865, which was, "that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in any civil actions, because he is a party to, or interested in, the issue tried." 13 Stat. at Large, 351. The immediate effect of the provision that no witness should be excluded in a civil action because he was a party to, or interested in, the issue tried, was to introduce diversity into the rules of decision in the Federal courts, as compared with the rules of decision prevailing in the State courts in the same district, as will be seen by reference to the statutes of this State. Provision was made by the General Statutes of this State (chapter 131, section

14), that parties in civil actions and proceedings . . . shall be admitted as competent witnesses for themselves or any other party, . . . provided that where one of the original parties to the contract or cause of action in issue and on trial is dead, the other party shall not be admitted to testify in his own favor unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will, or the appointment of the administrator. Gen. Stat. (Mass.) 673. Certain exceptions are made in subsequent acts of the legislature, but they are not material in this case. Sess. Act, 1864, c. 304, § 1; Supp. to Gen. Stat. 361; also Sess. Act, 1865, c. 207, §§ 1 and 2; Supp. to Gen. Stat. 407. Like diversities were introduced by the last two clauses of that provision into the rules of decision in the Federal courts of many other districts, as compared with the rules prescribed for the State courts in the same district by the State legislature, but it is unnecessary to enter into such details. Congress became aware of the embarrassment, and on the 3d of March, 1865, passed an amendatory act providing that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. 13 Stat. at Large, 533. The material words of the provision to be considered in this case are, that neither party shall be allowed to testify against the other in the cases and under the circumstances therein described, unless "required to testify thereto by the court," as it is not pretended that the complainant was called to testify thereto by the opposite party. Strictly construed, the petition of the complainant did not pray that she might be required by the court to testify in the case as to any transaction with or statement by the testatrix, but as the prayer was that an order might be passed that she might be allowed to testify generally as a witness, no exception was taken to the form of the petition, and the order as recited was passed, reserving to the court the right to deter-

mine the questions involved in the petition at the final hearing of the case. The views of the respondents at the time the petition was presented and at the final hearing were, that by the true construction of the phrase "unless required to testify thereto by the court," it only had the effect to save from the operation of the prohibition that neither party should be allowed to testify, the power vested in the court when sitting as a court of equity, to admit parties to be examined in certain cases as universally acknowledged and frequently practised in equity courts. Stated in other words, the proposition of the respondents is, that the act of Congress in question does not authorize the examination of the complainant in any case where it was not allowed in the practice of chancery courts before that provision was passed. They contend that the exception, unless required to testify thereto by the court, means nothing more than if it read, unless required to testify thereto by the court in accordance with equity practice. Interest undoubtedly disqualifies a witness in an equity suit as well as in actions at law, unless it is otherwise provided by statute. *Gres. Eq. Ev.* 237 ; 2 *Dan. Chan. Prac.* (3d ed.) 885 ; 1 *Smith's Chan. Prac.* 343 ; *Eckford v. De Kay*, 6 *Paige*, 565 ; *De Wolf v. Johnson*, 10 *Wheat.* 367. Leave may be granted to examine a party on motion, if the motion is accompanied by an affidavit showing that he is not interested ; but the order is never granted without saving all just exceptions for the benefit of the opposite party. *Gres. Eq. Ev.* 338 ; 2 *Dan. Chan. Prac.* (3d ed.) 886 ; *Dixon v. Parker*, 2 *Ves.* 222 ; *Murray v. Shadwell*, 2 *V. & B.* 401 ; *Phillips v. Duke of Bucks*, 1 *Vern.* 230 ; *Rogerson v. Whittington*, 1 *Swans.* 39. Based on these authorities, the argument for the respondents is, that the only effect of the last exception in that act of Congress is, that it reserves to the Federal courts the power which they possessed before as courts of equity to require or allow a party not interested to testify in the case ; but the court is of a different opinion, as the provision is general and applicable as well to the District Court as to the Circuit Court, and in common-law actions as well as in suits in equity. Cases have seldom or never before occurred where the right of a party to introduce evidence in support of the cause of

action set forth in his pleading, depended in any manner upon the discretion of the court; but if Congress sees fit to make such a provision, the court is of opinion that it is the right of a party to present such an application, and that it is the duty of the court to hear, and determine it whenever it is made in due form. Such an application is doubtless addressed to the discretion of the court, but it is a legal discretion, and our opinion is, that the court, in granting or refusing the application, ought to be governed as far as practicable by certain fixed rules, to be applied in all similar cases. Intrinsic difficulty, it is apprehended, may arise in every attempt to define such general rules, and perhaps it would be unwise to make any such attempt, except when an application is before the court calling for the decision of the court under the power conferred by the act of Congress. New as the provision is, and called upon as the court is for the first time to determine its true meaning, the court is not disposed to go one step beyond what the necessities of the present case require. Viewed as a whole, the several acts of Congress in relation to the competency of witnesses indicate an intent on the part of Congress so to legislate that the evidences of title to real estate, and the rules of decision in all controversies affecting rights of property, shall be the same in the Federal courts as in the State courts of the same State and district, and the decisions of the Supreme Court throughout the period since its organization tend strongly to the same end. Impressed also with the conviction that that course of legislation and of decision has been highly beneficial, we are of the opinion that the court ought not to grant such an application under the provision in question, in any case where the effect of granting it would be to adopt a rule of decision in the Federal courts of the district, different from that which the legislature of the State has prescribed for the government of the State courts in all similar cases. Where an executor or administrator is a party, the other party, under the law of the State, cannot be admitted to testify in his own favor unless the contract in issue was originally made with a person who is living and competent to testify, and this court decides, that in such a case the court will not pass an order in a

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controversy respecting property, requiring the living party to testify in his own favor to any transaction with, or statement by, the testator or testatrix, intestate or ward, as the case may be. Obviously the case at bar falls within that rule, and the decision of the court is, that the complainant is not a competent witness in this case to testify to any transaction with, or statement by, the said testatrix, and that all such parts of her deposition as fall within that rule are rejected as inadmissible.

Unaided by the testimony of the complainant as to any transaction with, or statement by, the testatrix respecting the matters in controversy, the next question is, whether the other evidence in the case is sufficient to prove the alleged contract, and to entitle the complainant to a decree in her favor. The principal breach of the supposed contract as alleged is, that the said Sylvia Ann made another will in which Thomas Mandell is named as executor, and by which she gave a large part of her property to other parties, and devised the residue to Edward D. Mandell, George Howland, Jr., and William Gordon, in trust, for the purpose therein described. Complainant also charges by way of evidence, that the said Sylvia Ann, on one occasion, when advised by the said Gordon to make a will, stated that she preferred not to make a will if she could help it, on account of the complainant, adding that she had been obliged to promise the complainant that she would not make a will without letting her know it; and the complainant also charges that the said Sylvia Ann stated on another occasion to the same person, that she would make a will if it were not for that pledge or promise to the complainant; and the answer admits that these conversations did take place as alleged. But the respondents allege that at the time the last conversation took place, she added that she was obliged to make the promise, because "she dinned me and teased me and gave me no peace till I did." Due weight must also be given to all such portions of the deposition of the complainant as are not excluded under the rule hereinbefore explained. She cannot be excluded as a witness because she is a party to or interested in the issue on trial. Her testimony as to any transaction with, or statement by, the said testatrix is not admissible,

but all the rest of the deposition, if otherwise unobjectionable, is competent evidence. She testifies in substance that she duly executed her will of the 19th of September, 1862, and that she gave it enclosed in a yellow envelope to her aunt, and that she never saw it afterwards until "a day or so" after her aunt's death, when it was handed to her, in the same envelope, out of the closet where her aunt's trunk was kept. Mrs. Brownell handed it to her, and it was opened, as she states, in a few minutes after, by Mr. Green, who is also a witness in the case.

The statement of the complainant also is, that the same person handed her, at the same time, a white envelope, which contained a copy of the second page of her aunt's will, and also a copy of the other part of the will, a fragment of which only is introduced, the residue having been destroyed by mistake. These several exhibits, together with the supposed originals, were introduced in evidence by the complainant, and she also examined Edward H. Green, whose testimony tends to confirm her statements, as to the finding of her own will in the yellow envelope; and he also testified that she showed him the papers in the white envelope, the evening after the funeral of her aunt, or the next evening, in the parlor of the house where she died. Evidence was introduced by the respondents tending to show that both these envelopes were put into the trunk of the deceased at the request of the complainant. Two witnesses examined by the respondents testified to that effect, but their testimony also tended to confirm to a considerable extent the statements of the complainant as to the time when and the place where they were found, and the principal circumstances attending the finding. The theory of the complainant is, that she made her own will at the request of the said Sylvia Ann, and in the form as requested, and that the said Sylvia Ann in consideration thereof promised the complainant that she would make her will devising her estate or the principal part thereof to the complainant, and that they mutually agreed with each other that neither would make another will without first complying with the conditions set forth in the bill of complaint. It was also a part of the agreement, as alleged, that the respective wills should be exchanged, and the argument is, that

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all the affirmative stipulations of the contract were fully performed, leaving nothing executory, except the negative stipulation that neither should make another will without first notifying the other and returning the other's will.

Entirely opposite views are submitted by the respondents in respect to every material element of the alleged contract. They deny that any such contract was ever made by those parties, or that any such motive existed for making it on the part of the said testatrix as is alleged in the bill of complaint. Although they do not question the genuineness of the will of the complainant, still they deny in the most positive terms that it was made at the request of the decedent, or that the latter in her lifetime ever promised the complainant, in consideration that she would comply with that request, that she, the said Sylvia Ann, would make her will and devise her estate or any part thereof to the complainant, or that the parties ever mutually agreed with each other that neither would make another will without first giving notice to the other, and returning the other's will, as before explained. It is also conceded by the respondents that the signature to the instrument described in the bill of complaint as the will of the said Sylvia Ann, dated January 11, 1862, is genuine; but they explicitly deny that the paper called the second page of the will was attached to that instrument before it was signed, or that it was ever any part of that instrument. On the contrary, they deny that it was ever signed by the said Sylvia Ann, and insist that it is a forgery. Much testimony was taken upon that issue by the parties to the suit, and the discussion of the questions growing out of it occupied several days at the final hearing. Some of the questions discussed were new, and it must be admitted that they are highly important as affecting the rules of evidence in cases where the genuineness of written instruments is in contestation, but inasmuch as it does not become necessary to determine whether the paper is or is not genuine, the court is not inclined to decide those questions in this case.

Viewed in any light, and assuming all the papers to be genuine, the evidence fails altogether, in the opinion of the court, to



prove that any such contract was made by those parties as is alleged. Nothing of the kind can be reasonably inferred from the admissions of the answer. Taken in their widest sense, the conversations therein recited do not warrant the conclusion that the party represented as speaking, supposed, or intended to admit, that she had ever entered into any legal obligation not to make a will, or that she had made any contract whatever with the complainant within the legal meaning of that word, much less any such contract as that set forth as the foundation of this suit. The import of the first conversation, as recited in the bill and answer is, that she preferred not to make a will if she could help it, as she had been obliged to promise the complainant that she would not do so without letting her know it; but she characterized the promise as a pledge in the second conversation, and finally said to the effect that she was forced to make the promise to get rid of constant importunity. Such remarks in regard to an absent relative are quite too loose and indefinite to be regarded as evidence of any legal obligation, especially as they do not contain the slightest intimation of any mutual promise, or of any other consideration recognized in the law of contracts.

Apart from the inferences, if any, which may be drawn from the wills in question, there is no evidence in the case that the complainant made her will at the request of the aunt, or that the aunt, in consideration of a compliance with any such request, ever promised the complainant that she would make her will and devise her estate or any part thereof to the complainant, or that those parties ever mutually agreed to exchange wills, and that neither would make another will without first notifying the other and returning the other's will. Those several allegations combined constitute the foundation of the complainant's case, and if they are not proved the superstructure must fall. The supposed consideration for the alleged promise of the decedent is, that the complainant, in compliance with the request of her aunt, made her own will, devising her estate in a way to exclude her father from all benefit under it, and the proposition is, that having framed and executed her will as requested, on the faith of her aunt's promise, that if she, the complainant, would do so, the

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aunt would make her will and devise her estate to the complainant, the promise of the aunt is valid and obligatory as falling within that class of contracts constituted by a promise or representation made by one person and acts done by another, on the faith of such promise or representation. Fry on Spec. Perf. § 187. Equity undoubtedly acknowledges the rule that a representation made by one party for the purpose of influencing the conduct of the other party will in general be sufficient to entitle that other party to substantial relief in case he or she is thereby induced to act upon it, and it appears that the representation is not made good. *Hammersley v. De Biel*, 12 Clark & Fin. 62, note; *Maunsel v. White*, 4 H. L. Cas. 1056. Such promises or representations, however, must be proved by the party who alleges that they were made, and if not proved his bill of complaint will be dismissed. The respondents deny that the rule suggested has any application to the case, and insist that the contract, even if proved as alleged, is void as against public policy, but in the view taken of the case it is not necessary to decide that point, as the court is of the opinion that the contract is not proved.

The views of the complainant also are, that the two wills set forth in the bill of complaint must be regarded as mutual wills, and that those instruments, together with the testimony describing the circumstances attending the finding of the will of the complainant and the copy of the other will in the trunk of the testatrix after her decease, afford sufficient evidence to support the material allegations of the bill of complaint, and to entitle the complainant to a decree. Admission may well be made that mutual wills, as understood in legal decision, afford evidence of a contract by the respective testators, each with the other, more or less strong, in view of the surrounding circumstances, that neither would revoke his will or make another without due and seasonable notice to the opposite party; but the insuperable difficulty in the complainant's case is, that the two wills under consideration are not mutual wills in any proper sense, as recognized in the law of evidence or the decisions of the courts. Where two persons agree each with the other to make mutual wills, and

both execute the agreement, it is held that neither can properly revoke his will without giving notice to the other of such revocation. The death of one of the parties in such a case carries his part of the contract into execution, and the better opinion perhaps is, that the other party, after that event, if the agreement was definite and satisfactory, cannot rescind the contract. *Dufour v. Pereira*, 1 Dick. Ch. 419 ; 2 Harg. Jurid. Arg. 272.

Both wills, it is agreed, even in a case where the agreement between the respective testators is fully proved, are still in their nature revocable ; but the doctrine is, that the parties are under a restriction, each to the other, not to revoke their respective wills so as to secure any undue advantage. Bound by the agreement to maintain good faith, each to the other, the conclusion is, that neither can revoke without giving due and seasonable notice. *Loffas v. Maw*, 32 L. J. (Eq.) N. s. 49 ; *Ridley v. Ridley*, 12 Law Times, N. s. 481. Few decided cases in point are to be found in judicial reports, and these are nearly equally divided for and against the doctrine, even when it appears that the agreement was fully proved. *Walpole v. Orford*, 3 Ves. Jun. 402 ; *Izard v. Middleton*, 1 Desaus. 116. Judge Story says that a contract to make mutual wills, if one of the parties has died having made a will according to the agreement, will be decreed in equity to be specifically executed by the surviving party, if he has enjoyed the benefit of the will of the other party. 1 Story's Eq. Jur. § 785. If persons enter into a fair and definite agreement to leave each other a sum of money, or to settle by their wills the property of each for the benefit of the survivor, a court of equity, says Roper, will enforce a performance of such agreement. Roper on Leg. 766 ; 3 Pars. on Con. 406 ; *Logan v. McGinnis*, 12 Penn. St. 27 ; 1 Jarm. on Wills, 28 ; 1 Williams, Exrs. 104. These authorities are cited to show that equity only interposes in such cases to enforce the agreement made by the parties. Competent evidence of any such agreement in this case is entirely wanting, and there is nothing on the face of the instruments to warrant any such conclusion. They were executed at different times, and the complainant devises nothing to the said Sylvia Ann. The allegation of the bill is, that the will of the complainant was drawn under the

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special direction of the aunt, but the averment is denied in the answer, and is wholly unsustained by any competent proof. Reference is also made to the paper called the second page of the will, but there is no proof in the case to show that the writing called the second page was ever attached to the will in question, before the will was signed and executed. Special reference is also made to the circumstances attending the finding of the two envelopes with their enclosures in the trunk of the testatrix after her decease. Satisfactory proofs are exhibited that these envelopes were handed by the complainant to the testatrix in her lifetime, but there is no evidence that the latter had any knowledge whatever of their contents. Subsequent to their being deposited in the trunk, she made and executed her last will and testament, and there is no reason appearing in the record to suppose she even suspected that those envelopes contained anything to show that in so doing she was violating the terms of any such contract as that alleged in the bill of complaint. They were deposited there by a female attendant of the said Sylvia Ann, pursuant to her directions, but at the request and in the presence of the complainant. Deposited in the trunk at her request, they remained there, for aught that appears to the contrary, till they were found by the complainant under the circumstances detailed in the proof. Inquiry into her motive in causing those papers to be deposited there is unnecessary, as neither the papers themselves nor the circumstances attending their finding afford any evidence to prove the special contract alleged in the bill of complaint.

Bill of complaint dismissed with costs.

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### DANIEL L. CHOATE *et al.* v. FRANCIS B. CROWNINSHIELD.

Common carriers are not responsible for losses or damage which may happen to goods received to be carried, if the same result from the act of the owner.

When goods are lost or damaged after their reception by the common carrier and before their delivery, the *prima facie* presumption is, that the loss was occasioned by the carrier's default.

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The legal effect of a bill of lading, affirming the goods to have been shipped in good order, is to raise a *prima facie* presumption that in all particulars open to inspection the goods were in that condition; but this does not preclude the carrier, in case of loss or damage, from showing that the loss proceeded from some cause which existed, but was not apparent, at the time he received the goods.

The responsibility of the carrier does not extend to damages resulting to a cargo of cotton in bales, from moisture of the contents of the bales received previous to the time of lading, which could not have been discovered by the master, and where the vessel was in all respects seaworthy, and there appeared to be no want of ordinary care, skill, and energy on the part of the master, to protect the goods against such injury while on board the vessel.

While cotton in bales was lying on the wharf, and while a vessel was loading with the same, it was discovered by the accidental opening of one bale that the contents thereof were wet. This fact was reported to the shippers, who said that the wet would do no injury, and the bale was thereupon tied up and placed on board. *Held*, that there was no evidence in the case to warrant the conclusion that the master had reason to believe any portion of the residue unfit for the voyage.

LIBELLANTS were the owners of the ship *Sciota*, and they instituted this suit against the respondent in the District Court to recover the balance of the freight alleged to be due to them on seven hundred and seventy-two bales of cotton which they transported in that ship from New Orleans to Boston, and there delivered to the respondent, as the consignee of the goods. The description of the goods and the terms of the shipment, as expressed in the bill of lading, were in substance and effect as follows: "Shipped in good order, seven hundred and seventy-two bales of cotton under deck, being marked and numbered as in margin, to be delivered in the like good order and condition at the port of Boston, the dangers of the seas only excepted, unto the respondent, the consignee or assigns, he or they paying freight for the goods five eighths of one cent per pound, with five per cent primage, average accustomed." Four bills of lading of that import were signed by the master, and the ship with the goods on board, on the 8th or 10th of February, 1859, sailed from the port of New Orleans, where the master received the goods specified in the bill of lading. The allegations of the libel were, that the ship arrived at the port of destination on the 22d of March in the same year, and that the master then and there made a true delivery of all the goods described in the bill of lading, to the agents of the respondents, according to its tenor and effect.

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The admission of the answer also was, that the whole number of bales were delivered ; but the respondent denied that they were all delivered in good order and condition, as alleged in the libel. On the contrary, he alleged that the contents of some of the bales were partially lost, and that the contents of some others were wet, and otherwise damaged, and that the coverings also had been wet and greatly damaged. The true amount of the freight was \$2,407 ; and the libellant admits that the respondent paid the sum of \$1,800 at the time the freight became due ; \$607.10 remained due to the libellants, if, as they alleged, the master made true delivery of the goods, as he stipulated to do in the bill of lading. The respondent denied that the master did so, and alleged that he suffered damage in consequence of the failure of the master to deliver the goods in like good order and condition as he received them on board, to the amount of \$500, which he claims to recoup out of the sum which would otherwise be due to the libellants, as the unpaid balance of the freight.

*Sohier and Welch*, for libellants.

*Lothrop and Bishop*, for respondent.

CLIFFORD, J. Exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction is conferred upon the District Courts by the ninth section of the Judiciary Act ; but the first section of the act of the 3d of March, 1821, provides that in all suits and actions in any District Court in which it shall appear that the judge of such court has been of counsel for either party, said suit or action may be certified to the next Circuit Court of the district. 1 Stat. at Large, 76 ; 3 Stat. at Large, 643.

Jurisdiction of the suit in this case is derived from that provision, the same having been duly certified into this court because the district judge had been of counsel to one of the parties.

The obligations of a common carrier by water, who receives goods to transport from port to port, are to keep the goods safely, duly transport them, and make right delivery of the same at the port of destination. *The Eddy*, 5 Wall. 481 ; *The Bird of Paradise*, 5 Wall. 545 ; *McAndrews v. Thatcher*, 3 Wall. 369.

Common carriers are responsible for all losses and damages

which may happen to goods received to be carried, except such as result from the act of God or the public enemy, or from the act or default of the owner himself, unless such liability is limited or restrained by the terms of the contract under which the goods were received. *Propeller Niagara v. Cordes*, 21 How. 26 ; *Hastings v. Pepper*, 11 Pick. 42. .

Dangers of the seas are excepted in the bill of lading in this case, but there is no other material limitation to the contract of affreightment. When goods in the custody of a common carrier are lost or damaged after their reception and before their delivery, the *prima facie* presumption is, that the loss or injury was occasioned by the default of the carrier, and the burden is upon him to prove that it arose from a cause for which he is not responsible. *Nelson et al. v. Woodruff et al.*, 1 Black, 156 ; *Clarke et al. v. Barnwell et al.*, 12 How. 280.

Such a presumption, however, is nothing more than a *prima facie* presumption, and it may be overcome by any proper testimony which is sufficient to show that the fact was otherwise. The legal effect of a bill of lading such as was given in this case, affirming that the goods were shipped in good order and condition, is also to raise a *prima facie* presumption that, as to all circumstances which were visible and open to inspection, the goods were in that condition, but it does not preclude the carrier from showing, if he can, in a case of loss or damage, that the loss or damage proceeded from some cause which existed but was not apparent at the time he received the goods, and which, if satisfactorily proved, will discharge him from liability. *Clarke et al. v. Barnwell et al.*, 12 How. 280.

Between the shipper and the ship-owner the bill of lading is not conclusive as against proof of latent defects, even in a case where the bill of lading states that the goods were shipped in good order and condition. *Ellis v. Willard*, 5 Seld. 530 ; *Shepard et al. v. Naylor et al.*, 5 Gray, 592 ; *Barrel v. Rogers*, 7 Mass. 297 ; *Haddow v. Parry*, 3 Trent, 303 ; M. on Ship. 339 ; *Bates v. Todd*, 1 Rob. 106 ; *Sears et al. v. Wingate*, 3 Allen, 103 ; 1 Pars. M. L. 37 ; *Berkley v. Watling*, 7 A. & E. 29 ; *O'Brien v. Gilcrest*, 34 Me. 554.



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Applying these principles of law to the case, it is quite clear that the decision must turn upon the questions of fact which may be determined without any extended argument, as there is not much real conflict in the testimony, except as to a single point. The seaworthiness of the ship is not controverted, and the proofs show that she was staunch and strong, and that she was well manned and equipped. Due care was used in taking the cargo on board, and the goods of the respondent were well stowed and dunnaged.

The testimony of the master is, that there were two iron ventilators in the ship, one forward, and one aft, and that the hatches were left open till they left the bar, near the mouth of the river. The usual length of a voyage from New Orleans, as shown in the testimony, is eighteen or twenty days, but the ship in this case was detained twenty days inside the bar. During that period, the evidence is, there was little or no motion in the vessel, and that the weather was hot, sultry, and disagreeable, and that there were light showers with heavy fogs. Want of motion in the vessel doubtless rendered the circulation between decks and in the hold less than it would have been if the vessel had been under way. Proper care appears to have been taken of the goods from the time they were delivered on the wharf until they were stowed in the ship, and the proofs show that none of the bales remained on the wharf more than four days before they were shipped. The outside appearance of the bales was "ordinarily good," and nothing except a single circumstance occurred during the loading of the ship to awaken any suspicion that the contents of the bales were in any respect unfit for transportation in such a voyage. When about two thirds of the consignment had been loaded and stowed, the master discovered a man attempting to steal cotton from one of the bales on the wharf, but he escaped before he could be apprehended. He had cut the bagging so that the contents were exposed, and on examining the cotton the master found that it was wet, and immediately reported the fact to the shippers.

The statement of the master is, that when he reported the fact to the shippers, they told him that the wet would not injure it, as

it was bound coastwise, and he immediately tied up the broken bale, and it was taken on board. Other than that circumstance, there does not appear that anything occurred, or that there was anything in the outside appearance of the bales calculated to create suspicion that the goods were not in a proper condition for the voyage.

Two propositions are submitted by the respondent in respect to that evidence : —

1. He insists that it does not sufficiently appear that the bale cut open was one that belonged to his consignment.

2. But if it did, then it shows that the defect in the goods, if it existed at that time, was not latent.

Neither of the propositions, however, can be sustained to an extent to benefit the respondent. The better opinion from all the evidence is, that the broken bale was one which belonged to his consignment, and there is no evidence to warrant the conclusion that the master had any reason to believe that any portion of the residue was unfit for the voyage, especially as he was assured to the contrary by the shippers. The theory of the libellants is, that the bales had been exposed to rain, either on the plantation where the cotton was grown and put in bales, or on the way down the river, or on the levee before it was delivered to the master, or that it was injured by the humidity of the atmosphere and dampness of the ship's hold, where most of the respondent's consignment was stowed. The responsibility of the carrier does not extend to damage resulting from such causes, if it appear that the vessel was in all respects seaworthy, and that there was no want of ordinary skill and vigilance and energy on the part of the master to protect the goods against such injury. *Clarke et al. v. Barnwell et al.*, 12 How. 282 ; *Abb. on Ship.* 42 ; *Lamb v. Parkman*, 20 Law Rep. 186 ; 1 Pars. Mer. L. 136, n. 1.

Examined in view of the testimony that much of the top tier between decks appeared as if wet from steam and sweat, and that the bagging and bands were mouldy, and that the bagging was much decayed, it seems almost an irresistible conclusion that the cotton must have received the damage from a combination of both the causes suggested by the libellants, as

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the testimony negatives every theory suggested by the respondent. Twenty or thirty bales were slightly wet by sea-water, but the same witnesses who state the fact affirm that it was hardly sufficient to deserve notice. The plain inference from the evidence is, that the bales, before they were delivered to the master, had been exposed to the rain, so that the cotton within the bales was damp. Cotton in that condition when stowed, either in the hold or between decks, will soon create heat, and the moisture under the influence of the heat will generate steam and produce all the results shown in this case.

When the ship in the course of her voyage passed into cold weather, those in charge of her noticed that steam was escaping from the ventilators of the vessel, which is strong evidence in support of the libellant's theory. Weighed in any just view of the evidence, there does not appear to be any good reason to question the credibility of the master, or those associated with him in the charge of the vessel; and it is clear that the libellants are entitled to recover, unless the statements of those witnesses can be overcome. The actual delivery of all the bales is conceded, and the testimony shows that they were accepted by the respondent and sent to certain cotton-mills and appropriated to the use for which the cotton was designed. Nothing appears in the case to show how much the cotton in the broken bale was injured, beyond what is shown in respect to it at the place of loading.

Another theory of the respondent is, that the cotton in other bales belonging to other consignments was wet, and that the damage to their cotton was occasioned in that way, but it is sufficient answer to that proposition to say that it is not satisfactorily supported by the evidence.

The amount not being a matter of dispute, it does not seem necessary to send the case to an assessor.

Decree for the libellants.

## SAMUEL C. COBB v. HANNIBAL HAMLIN.

Under the act of the 3d of March, 1865, the dutiable value of imported merchandise is the actual market value, or wholesale price thereof at the period of exportation to the United States, in the principal markets of the country from which the same was exported, without any addition for commissions, brokerage, costs of transportation, shipment, or transshipment, or other like costs in placing the goods on shipboard.

Where goods are purchased in the foreign market in bulk, and subsequently to the purchase put into the packages, boxes, or coverings by the buyer for convenience or preservation, actual market value does not include such packing, under the act of March 3, 1865.

ASSUMPSIT to recover certain duties paid under protest. Facts agreed, of which the following are the material ones: —

Five invoices of lemons and oranges packed in boxes were imported from Palermo, Sicily, into the port of Boston, and were duly entered for consumption or warehousing by the plaintiff, as consignee of the respective invoices. They were imported and entered at the custom-house between the 18th of November, 1865, and the 14th of April, 1866. The parties agreed that the lemons and oranges were purchased at Palermo by the shippers in bulk, at certain rates by the thousand, and were then “one by one” wrapped in paper and packed in boxes furnished by the purchaser, for the purpose of preserving the fruit, and for more convenient shipment. The net cost and value of the lemons and oranges in bulk, embraced in the five invoices, was, at the place of exportation, \$8,549, exclusive of the cost of the boxes and packing; and all other costs and charges for the boxes, nails, packing-paper, charges of shipment, and other charges, besides the cost and value of the lemons and oranges imported, were \$7,852. The finding of the appraisers was, that the invoice value of the cost of the lemons and oranges was, as purchased in bulk, correct, but they added the sum of \$7,872, as the costs and charges for the boxes and packing, etc., and for the other charges, which was agreed to be correct in amount, if it was properly to be added, in ascertaining the dutiable value of the merchandise.

The amount of the duties assessed and collected was \$3,836.75, of which \$1,864.50 were assessed on the costs and charges, added to the invoice value. The plaintiff duly protested, and season-

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ably appealed to the Secretary of the Treasury, but the department affirmed the doings of the collector. Dissatisfied with the decision of the department, the plaintiff instituted this suit to recover back the duties assessed upon the costs and charges, which he insisted were illegally exacted. Judgment was to be rendered in favor of the plaintiff for that sum, if none of the costs and charges, as expressed in the invoices, were properly added to the invoice value of the lemons and oranges, in order to ascertain the dutiable value of the importation, with interest from such time as the court might determine to be just and right. But if the court should be of the opinion that the whole amount of the costs and charges was properly added to the invoice value of the oranges and lemons, as purchased in bulk, then the judgment was to be for the defendant.

*Jewell and Gaston*, for plaintiff.

The words "actual market value" and "wholesale price" have received judicial construction, and this construction excludes costs, charges, and boxes, etc. *Barnard v. Morton*, 1 Cur. 404; *Grinnell v. Lawrence*, 1 Blatch. 350; *Wilson v. Maxwell*, 2 Blatch. 321; *Wilbur et al. v. Lawrence*, 2 Blatch. 315; *Belcher v. Linn*, 24 How. 535; *Knight et al. v. Schell*, 24 How. 530; Regulations of Treasury Dept., 1857, § 305, p. 177; § 306, p. 177; § 364, p. 193.

Under former laws which included costs and charges in the dutiable value, the "sacks, hogsheads, etc." were included in the costs and charges, and were added to the appraised value of the commodity. *Belcher et al. v. Linn*, 24 How. 535, and other cases cited above.

That it was the intention of Congress to create a new and different rule, which should exclude all costs and charges from the dutiable value, is seen by comparing the phraseology of the seventh section of the act of 1865 with that of previous acts.

1. Compare first part of § 7, act of 1865, with § 1, act of March 3, 1851, 9 Stat. at Large, 629.

2. Compare same with § 16, act of August 30, 1842, 5 Stat. at Large, 563.

3. Compare the rest of § 7, act of 1865, beginning at twelfth line, with § 23, act of June 30, 1864, 13 Stat. at Large, 226.

If a subsequent statute professes, or manifestly intends, to regulate the whole subject to which it relates, it repeals all former statutes so far as it differs from them. *Daviess et al. v. Fairbairn et al.*, 3 How. 636 ; *D. & L. Plank Road Company v. Allen*, 16 Barb. 15 ; *Illinois & Michigan Canal v. Chicago*, 14 Ill. 342.

If the act of 1865 contained no repealing clauses, it would make a complete and perfect rule for assessing duties on the merchandise in question, excluding all costs and charges, and would by necessary implication repeal all previous statutes providing a different rule. *Farr v. Brackett*, and Tr. 30 Vt. 344.

But the act of 1865 goes further, and in express terms repeals the act of 1864 ; and all acts and parts of acts requiring duties to be assessed upon commissions, brokerages, costs of transportation, shipment, and other like costs and charges incurred in placing any goods, wares, or merchandise on shipboard, and all acts and parts of acts inconsistent with its provisions.

All acts which provide a different rule for assessing duties are inconsistent with the act.

The words "costs and charges" include boxes. *Barnard v. Morton*, 1 Cur. 404 ; *Belcher et al. v. Linn*, 24 How. 535 ; *Knight et al. v. Schell*, 24 How. 530.

"Laws imposing duties are never construed beyond the natural import of the language used, and duties are never imposed upon the citizens upon doubtful interpretations, for every duty imposes a burden upon the public at large, and is construed strictly, and must be made out in a clear and determinate manner from the language of the statute." *Adams v. Bancroft*, 3 Sumn. 387 ; *Powers v. Barney*, per Nelson, C. J., C. C. So. Dist. N. Y., November Term, 1863.

"Revenue and duty acts are to be construed according to the true import and meaning of their terms ; and when the legislative intention is ascertained, that, and that only, is to be our guide in interpreting them." *United States v. Breed*, 1 Sumn. 160.

"Statutes levying duties on citizens or subjects are to be construed most strongly against the government, and in favor of the citizen." *United States v. Wigglesworth*, 2 Story, 369 ; *United States v. Morse*, 3 Story, 87.

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“ As Congress wishes to foster an honest and honorable commerce by its laws, no less than to obtain revenue, it is neither the true policy nor the right of departments or of the courts, nor is it presumed to be their desire, to thwart the views of Congress, or embarrass mercantile business when not attended by equivocation and fraud, or to throw doubts or difficulties over the liberal course proper to be pursued generally towards the community in any branch of trade.” *Marriott v. Brune*, 9 How. 635.

*W. A. Field*, Assistant United States Attorney.

1. Some of the statutes relating to the dutiable value of merchandise and what are to be included in making up the value on which *ad valorem* duties were or are to be levied are the following: § 17, c. 5, 1789, 1 Stat. 41; § 39, c. 35, 1790, 1 Stat. 167; § 3, c. 17, 1795, 1 Stat. 411; § 61, c. 22, 1799, 1 Stat. 673; c. 51, 1817, 3 Stat. 369; § 4, c. 79, 1818, 3 Stat. 434; § 5, c. 21, 1823, 3 Stat. 732; §§ 7 and 15, c. 227, 1832, 4 Stat. 591 and 593; § 16, c. 270, 1842, 5 Stat. 563; § 1, c. 38, 1851, 9 Stat. 629; § 28, c. 68, 1861, 12 Stat. 197; § 24, c. 171, 1864, 13 Stat. 217; repealed by § 4, c. 80, 1865, 13 Stat. 493; § 9, c. 298, 1866, 14 Stat. 330.

Up to 1823 the cost was the basis of dutiable value, a percentage was usually added, and the cost of outside packages was in general excluded; by the act of 1823, § 5, the actual cost if purchased; the actual value if procured otherwise than by purchase, and at the time and place when and where the merchandise was purchased or procured; the appraised value if appraised, with all charges added, except insurance, made the dutiable value. § 15 of act of 1832 is substantially the same as the § 5, act of 1823, except the addition of a percentage is omitted. § 16, act of 1842, makes the dutiable value the actual market value or wholesale price, at the time when purchased, in the principal markets of the country, with all costs and charges, except insurance, added, including charge for commissions. § 9, act of 1851, extends to all merchandise whether purchased or not, and makes the period of exportation the time, and no other material changes. § 28, c. 68, 1861, makes day of actual shipment the time, the words “ period of exportation ” having been held to be the day



of sailing. § 24, c. 171, 1864, makes the actual value of such goods on shipboard at the last place of shipment the dutiable value, adding the cost of transportation from the place of growth, etc., of shipment or transshipment, and all expenses included by land or water to the vessel in which shipment is made to the United States, the value of the sack, box, or covering of any kind, commission, etc., brokerage, export duties, and all costs and charges paid or incurred for placing such goods on shipboard, and all other proper charges specified by law. § 7, c. 80, 1865, makes the actual market value or wholesale price at the period of exportation to the United States, in the principal markets of the country whence exported, the dutiable value, and expressly repeals the § 24, of the act of 1864, and all acts or parts of acts requiring duties assessed upon commission, brokerage, cost of transportation, shipment, transshipment, and other like costs and charges incurred in placing the merchandise on shipboard, and repeals all acts and parts of acts inconsistent with this act. This act took effect on April 1, 1865, and the seventh section remained in force until the act of July 28, 1866, § 9 of which, 14 Stat. p. 330, substantially enacts the § 24 of the act of 1864, except the one makes the actual value on shipboard at the last place of shipment the dutiable, and the other, the actual wholesale price or general market value, at the time of exportation, in the principal markets of the country from whence the same shall have been imported, the dutiable value. The main change in the law of 1865, from that of 1864, is a return to the system of valuation on the basis of the market values in the principal markets of the country, and not a valuation of actual value at the last place of shipment, made up of the actual value at the place of growth, with the charges of transportation and shipment added. There is no express repeal of either the act of 1851 or the act of 1842. General Regulations, pp. 76, 77 ; also § 370 ; and such are the decisions of the courts. *Barnard et al. v. Morton*, 1 Cur. 404 ; *Gant v. Peaslee*, 2 Cur. 250 ; *Warren v. Peaslee*, 2 Cur. 231.

Excepting commission, brokerage, and insurance, there were two classes of costs and charges, the first being the costs and charges of putting the merchandise into the form in which it

entered into trade and commerce, as putting lemons into boxes ; and the second being the cost of transporting this merchandise to the place of shipment and putting it on board. In the law of 1865, it seems to have been regarded that the importation began when the merchandise began to be transported. § 9 names commission, brokerage, cost of transportation, shipment, transshipment, and other like costs and charges incurred in placing any goods, wares, and merchandise on shipboard.

Repeals by implication are not favored, and are carried no further than direct and absolute repugnancy or inconsistency requires. The § 9, of the act of 1865, is not repugnant to either the act of 1842 or 1851, in the matter of adding the first class of charges in making up the dutiable value, and the language of the § 9, by a well-known rule of construction, excludes any such intention.

The § 31, of the act of 1861, expressly repeals all acts and parts of acts repugnant to its provisions, and § 28 of the same act is, that the duty shall be estimated upon the value on the day of actual shipment ; yet the practice of the department was, to regard the act of 1861 as only changing, in the specified cases, the time to which the valuation relates, from the period of exportation to the day of actual shipment, as the act of 1851 had changed the act of 1842, which in certain cases fixed the time when the merchandise was purchased as the time to which the valuation relates, and the department insisted upon the same addition of costs and charges under the act of 1861, as under the acts of 1851 and 1842.

This question is very different from one that arises under specific duties, that is, where the law imposes a duty of five cents per pound on merchandise. The law may establish an arbitrary tare for boxes, barrels, and bales, and then the rule established by law must prevail ; but in the absence of all law expressly establishing the tare, it might perhaps be held that the five cents per pound is leviable only upon the net weight. See *Wilson et al. v. Maxwell*, 2 Blatch. 316.

This case is also distinguishable from a case where the merchandise is for convenience packed in a box, which merchandise

is not customarily bought and sold by the box, and a box of which has no well-known commercial meaning.

Oranges and lemons in boxes are for commercial and tariff purposes like molasses in hogsheads, or liquors in casks, barrels, and bottles; the boxes hogsheads, casks, barrels, and bottles are not regarded as independent importations, and are not dutiable as such, but as incidental and annexed to their contents, forming altogether well-known articles in commerce and trade.

CLIFFORD, J. Collectors of the customs within whose districts merchandise subject to an *ad valorem* rate of duty was imported or entered, were required by the act of the 3d of March, 1865, to cause the actual market value or wholesale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same was imported into the United States, to be appraised, and the act provided that such appraised value should be considered the value upon which the duty should be assessed. 13 Stat. at Large, 493.

Throughout the period of these importations the act of the 3d of March, 1865, was in full force and operation. Reference to the ninth section of the act will show that it went into operation on the 1st of April after it was passed, and it continued in force until the 10th of August of the following year. 14 Stat. at Large, 328. Actual market value of imported merchandise subject to any *ad valorem* rate of duty was required by the sixteenth section of the act of the 30th of August, 1842, to be estimated, ascertained, and appraised as it was in the principal markets of the country from which the same was imported, and at the time when the merchandise was purchased, and the provision was, that to such value or price should be added, as the true value upon which the duties should be assessed, all the costs and charges, except insurance, and including in every case a charge for commissions at the usual rates. 5 Stat. at Large, 563.

The same provision was incorporated into the Appraisement Act of the 3d of March, 1851, except that the requirement in that act is, that the actual market value or wholesale price of the merchandise shall be appraised, estimated, and ascertained at the period and place of exportation. 9 Stat. at Large, 629. Costs

and charges, as distinguished from the actual market value of the merchandise, were under those acts properly added to such market value, as the means of ascertaining the dutiable value of the importation at the port where the merchandise was entered. *Knight et al. v. Schell*, 24 How. 531. Whenever a properly certified bill of lading is presented, showing the day of actual shipment, the twenty-eighth section of the act of the 2d of March, 1861, provides that the duty shall be estimated and collected on the day of actual shipment. 12 Stat. at Large, 197.

In determining the valuation of goods imported from foreign countries, the twenty-fourth section of the act of the 30th of June, 1864, provides that the actual value of such goods on shipboard at the last place of shipment to the United States shall be deemed the dutiable value, except in certain cases not necessary to be noticed. Such value, the same section provides, shall be ascertained by adding to the value of the goods at the place of growth, production, or manufacture, the cost of transportation, shipment, and transshipment, with all the expenses incurred from the place of growth, production, or manufacture, whether by land or water, to the vessel in which shipment is made to the United States, and the value of the sack, box, or covering of any kind in which such goods are contained, commission at the usual rate, in no case less than two and one half per centum brokerage, and all export duties, together with all costs and charges paid or incurred for placing said goods on shipboard, and all other charges specified by law. 13 Stat. at Large, 217. Comment upon that provision is unnecessary, as it is clear that if the respective importations in this case had been made under it, the plaintiff would have no claim to recover back any portion of the duties assessed by the collector. But the lemons and oranges in this case were imported under the act of the 3d of March, 1865, which required the collector within whose district the same were entered to cause the actual market value or wholesale price thereof at the period of the exportation to the United States, in the principal markets of the country from which the same was imported, to be appraised; and the same section also provides in express terms "that such appraised value shall be

considered the value upon which the duty shall be assessed." Still the views of the department might be sustained if the twenty-third section had been continued in force; but that section is in terms repealed by the second provision of the seventh section of the act under which the respective importations were made. 13 Stat. at Large, 494. Section seven also enacts that all acts and parts of acts requiring duties to be assessed upon commissions, brokerage, cost of transportation, shipment, transshipment, and other like costs and charges incurred in placing any goods, wares, or merchandise on shipboard, shall be repealed, and expressly provides, in conclusion, that all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Expressed, as the intention of Congress is in that provision, in plain and unambiguous language, it furnishes the absolute rule of decision which is obligatory upon the court. Under that provision, therefore, the dutiable value of imported merchandise is the actual market value or wholesale price thereof at the period of exportation to the United States, in the principal markets of the country from which the same was imported into the United States, without any addition for commissions, brokerage, costs of transportation, shipment, or transshipment, or other like costs and charges in placing the goods on shipboard.

If any confirmation of this view be needed, except what is derived from the language employed, it is found in the fact that Congress on the 28th of July, 1866, re-enacted in substance and legal effect the provision requiring that all such costs and charges should be added to the actual market value, as the basis for the assessment of the duties. 14 Stat. at Large, 330. Considered in any point of view, it is quite clear that the dutiable value of merchandise imported between the 1st of April, 1865, and the 10th of August of the following year, when the existing act went into operation, was only the actual market value thereof, to be appraised, estimated, and ascertained as before explained.

Such being our conclusion, it only remains to ascertain whether the costs and charges in this case are properly to be regarded as

an element of the actual market value of the merchandise within the meaning of that act of Congress. Some descriptions of goods are purchased and sold in the foreign market in bulk, and are subsequently to the purchase and sale put into boxes, packages, or coverings, by the purchaser, for the preservation of the merchandise and the convenience of shipping. Other descriptions are put into boxes, packages, or coverings by the producer, manufacturer, or wholesale merchant in the foreign country, and the merchandise is there purchased and sold for exportation in the boxes, packages, or coverings in which it is so placed by the producer, manufacturer, or wholesale merchant. The actual market value in the former case does not include the cost of the box, package, or covering within the meaning of that act of Congress, as the boxes, packages, or coverings in such cases are purchased by the shipper, as the means of preserving the goods, and for the convenience of shipment. But no doubt is entertained that the words "actual market value," without more, would include the cost of the box, package, or covering in all cases where the merchandise in question was actually purchased in the box, package, or covering, and is usually so purchased and sold for shipment in the foreign market, and where the price includes the box, package, or covering as well as the goods therein contained. *Barnard et al. v. Morton*, 1 Cur. 412; *Grinnell v. Lawrence*, 1 Blatch. 350; *Belcher v. Linn*, 24 How. 535; *Knight et al. v. Schell*, 24 How. 530; *Wilson v. Maxwell*, 2 Blatch. 35.

The defendant as well as the plaintiff agrees, that the general custom of shippers of lemons and oranges at Palermo is, if the fruit is purchased in bulk, to have it packed in boxes for shipment in substantially the same manner as the lemons and oranges were packed in this case. All of the lemons and oranges in this case were purchased in bulk at a certain rate by the thousand, and were afterwards selected and packed "one by one" in boxes, and transported to the place of shipment. Evidently the expense of the boxes and the labor of selecting and packing the fruit were wholly separate from the price paid in the purchase of the same, and it is equally clear that it was incurred to preserve the fruit, and for the convenience of shipment. Undoubtedly

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such fruit is usually bought and sold here, by wholesale merchants and jobbers, in the boxes, and without any additional charge for the box, but that circumstance cannot affect the question under consideration, as the inquiry is as to the actual market value or wholesale price of the merchandise in the principal markets of the country from which the same was imported.

Judgment for the plaintiff for the sum of \$1,864.50, with interest from the time of actual payment.

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THE MERCHANTS' NATIONAL BANK OF BOSTON v. THE STATE  
NATIONAL BANK OF BOSTON.

BEFORE CLIFFORD AND LOWELL, JJ.

The word "require" in section fifteen of the Judiciary Act, when taken in connection with a subsequent clause, does not mean to include a power in the Circuit Courts to compel a compliance with an order to produce books or writings; but if the party against which the order is passed shall fail to comply, then it shall be lawful for the court to give judgment, if against the defendant, the same as in case of default, if against the plaintiff, the same as in case of nonsuit.

At common law parties were not competent witnesses, and they could not be compelled to attend, by writ of *subpoena*, or bring with them any writings pertinent to the issue, by the writ of *subpoena duces tecum*.

Notice to produce was at law the only method of a party desiring the production of papers by the other, unless he resorted to equity.

Such notice, however, only laid the foundation for the production of secondary proof.

The conditions under which the power to require the production of writings, etc. should be exercised are: the motion must be in a case at law; the writings, etc. must appear to be in the possession of the party against whom the order is passed; it must appear that they contain evidence pertinent to the issue, and that the circumstances are such that the party might be compelled to produce them, as provided in the section referred to.

The order may be absolute or *nisi*.

Production before the trial is not perhaps contemplated by the provision, unless there is just ground to apprehend that the writings may be destroyed, or transferred to another, or removed out of the district, in which cases the order should be made without delay, and absolute.

In the case of incorporated banks having officers well known as the custodians of their books and papers, notice should be given for such officers to produce any document desired in the case.

**MOTION** by plaintiffs that defendants be required to produce certain documents or writings in their possession.

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Sufficient of the material facts appear in the opinion.

*Sidney Bartlett, J. G. Abbott*, for plaintiffs.

*B. R. Curtis, C. B. Goodrich, B. F. Thomas*, for defendants.

CLIFFORD J. Power is conferred upon the Circuit Court, by the fifteenth section of the Judiciary Act, in the trial of actions at law, on motion of either party, and due notice thereof being given, to require the opposite party to produce any books or writings in his possession or power, which contain evidence pertinent to the issue in cases, and under circumstances where the party might be compelled to produce the same by the ordinary rules of proceeding in chancery. 1 Stat. at Large, 82.

Evidently the word "require," when taken in connection with the subsequent clause of the same section, does not include a power to compel a compliance with the order and direction of the court. On the contrary, the provision is, that if a plaintiff shall fail to comply with such order, it shall be lawful for the court, on motion, to give the like judgment for the defendant as in case of nonsuit, and if a defendant fail to comply with the order, it shall be lawful for the court, on motion, to give judgment for the plaintiff, as in case of a default. Evidence is essential in the trial of actions at law; and the acts of Congress, and the rules and usages of courts, provide the means for compelling the attendance of necessary witnesses for the purpose, and the production of books and writings material to the issue. Circuit Courts, as well as all other Federal courts, may issue any writ necessary for the exercise of jurisdiction, agreeably to the principles and usages of law, and of course they may issue the writ of *subpæna*, to compel the attendance of witnesses. They may also issue the writ of *subpæna duces tecum*, to compel the attendance of a witness, and also to require him to bring with him books and writings in his possession containing evidence material to the issue in a pending action. Parties were not competent witnesses at common law, and of course they could not be compelled to attend the trial, by the writ of *subpæna*, or to attend and bring with them any books or writings in their possession which were pertinent to the issue, or which might tend to elucidate the matter in controversy, by the writ of *subpæna*

*duces tecum*. Notice to produce was the only remedy of a party in a suit at law, unless he resorted to equity, in case the other party to the record had in his possession books or writings containing evidence material in the trial. Such notice, however, never enabled the party to compel the production of such books or writings. All the effect it had was to lay the foundation for the introduction of parol or secondary proof of their contents, in case it appeared that the books and writings described in the notice were in the possession of the party notified, and that he refused to produce them at the trial, as requested. Recent acts of Congress make parties, where the suit is between individuals, competent witnesses, which in many cases affords a better and more certain remedy in relation to books and writings in possession of the opposite side, than notice to produce. Besides these common-law remedies to obtain such books and writings, when "pertinent to the issue," power is conferred upon the Circuit and District Courts of the United States to require a party, in the trial of actions at law, to produce books or writings in his possession or power, if it appears that they contain evidence pertinent to the issue, and the case and circumstances are such that he might be compelled to produce the same by the ordinary rules of proceedings in chancery suits. Undoubtedly the power conferred is a discretionary power, but it is one which should be firmly exercised in a case falling within the conditions specified in the provision, when it appears that there is just ground to apprehend that delay will defeat the action of the court, and that the party is unable to obtain the evidence by *subpoena duces tecum*, and that the case and circumstances are such that notice to produce is not a safe and adequate remedy. Unless the case is shown to be one within the conditions specified in the provision, the power "to require" or pass the order does not exist. Those conditions are that the motion must be in a case at law, and on due notice to the opposite party, and it must appear that the books or writings are in the possession or power of the other party, and that they contain evidence pertinent to the issue, and that the case and circumstances are such that the party might be compelled to produce the same, as therein pro-

vided. No doubt is entertained that the motion may be made, in a pending action at law, before the day of trial; but the requirement of the order of the court must perhaps be that the books and writings be produced at the trial of the action. Such an order may be absolute or *nisi*, as the circumstances may justify or require. Production before the trial is not perhaps contemplated by the words of the provision, nor is it in general necessary, as the penalty, in case of failure to comply with the order, is not arrest and imprisonment until the party comply, as for a contempt, but a judgment of nonsuit, or default, as the plaintiff or defendant is the offending party. Where the motion is accompanied by satisfactory proof that the case is one in all respects within the conditions of the provision, and it is also satisfactorily shown that there is just ground to apprehend that the books and writings may be destroyed or transferred to another, or removed out of the jurisdiction before the day of trial, the order should be made without delay, and be absolute. On the other hand, if there is no suggestion of fraudulent intent to suppress the documents, and the evidence to show that they contain any matter pertinent to the issue is not satisfactory, the order, if made at all, should be made *nisi*, or the application may be refused.

Danger that the evidence, if any, will be suppressed, or that the books and witnesses will be transferred, or that they will be removed out of the jurisdiction, is not suggested in this case, and the evidence to show that the case is one within the conditions of the provision is not entirely satisfactory. Were there no other objections to the granting of the motion, we should be constrained to deny it, but there is another even more decisive than those already suggested. Incorporated banks have officers for the transaction of their business, and some one or more of those officers, as provided by law, and the usages of such institutions, have the possession of the books and papers, and are known as the legal custodians of everything belonging to the corporation. Heretofore the commands of the *subpoena duces tecum* have been ample to obtain such evidence as that described in the motion, and the court is not satisfied that the

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same process will not have a like salutary effect in this case. Should it fail, it will then become the duty of the court, in case a proper application is made, to exercise all the power it possesses to afford an adequate remedy to the moving party in this case.

Motion denied.

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**THE MERCHANTS' NATIONAL BANK OF BOSTON v. THE STATE  
NATIONAL BANK OF BOSTON.**

**BEFORE CLIFFORD AND LOWELL, JJ.**

Judges of the Circuit Courts cannot direct a peremptory nonsuit, but the defendant, when the plaintiff's case is closed, may move the court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to warrant a verdict, and that, as matter of law, their verdict should be for the defendant.

The motion must be made at the close of the plaintiff's case, or the trial must proceed.

The motion is not addressed to the discretion; it presents a question of law, and the ruling of the court is a subject of exception.

A power evidenced by a usage must be considered as defined and limited by that usage; and if it appeared that a usage existed among certain banks other than the defendant bank for the cashier to certify checks upon them, it is doubtful if it could be regarded as evidence that the cashier of the defendant bank had any such authority.

The motion by the defendant in this case, that the court instruct the jury that the evidence introduced by the plaintiff was not sufficient to warrant a verdict, was allowed, because it was *held* that the act of June 3, 1864, conferred no authority upon the cashier of the defendant bank to certify as good the checks described in the declaration.

ASSUMPSIT upon certain checks upon the defendant bank, and certified as good by the cashier thereof. At the close of the plaintiff's case the defendant moved that the court instruct the jury that the evidence introduced by the plaintiff was not sufficient to warrant a verdict.

*Sidney Bartlett, J. G. Abbott*, for plaintiffs.

*B. R. Curtis, C. B. Goodrich, B. F. Thomas*, for defendants.

CLIFFORD, J. Repeated decisions of the Supreme Court have established the rule that the judges of the Circuit Courts cannot direct a peremptory nonsuit when the plaintiff is present in court and claims the right to submit his case to the jury. But the defendant instead thereof, when the plaintiff's case is closed, may,

if he sees fit, move the court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to warrant a verdict in his favor, and that as matter of law their verdict should be for the defendant. Unless such a motion is made for the defendant at the close of the plaintiff's case, the trial must proceed, and the evidence must be submitted to the jury, under the instructions of the court. When made, the motion is not one addressed to the discretion of the court, but it presents a question of law, which it is the duty of the court to decide, and the ruling of the court, in granting or refusing the motion, is as much the subject of exceptions by the party aggrieved as any other ruling of the court in the course of the trial.

In considering the motion, the court proceeds upon the ground that all the facts stated by the plaintiff's witnesses are true; and the rule is, that the motion should be denied, unless the court is of the opinion, in view of the whole of the plaintiff's evidence, oral and written, and of every inference the law allows to be drawn from it, that the plaintiff has not made out a case which would warrant the jury to find a verdict in his favor. Evidently the plaintiff's case, when viewed in that light, presents a question of law for the court, and it is well settled by the highest authority that it is the duty of the court to give the instruction whenever it appears that the evidence is not legally sufficient to serve as a foundation for a verdict for the plaintiff. *Scuchardt v. Allens*, 1 Wall. 370; *Parks v. Ross*, 11 How. 362; *Bliven et al. v. New England Screw Company*, 23 How. 433.

Guided by these views, the court has come to the conclusion that the prayer for instruction presented by the defendants must be granted. Considering that the case is one which will probably be removed into the Supreme Court for review, the court does not deem it necessary or expedient to enter into any extended discussion of the several questions involved in the motion.

Briefly expressed, the grounds of the decision of the court may be stated in the following propositions, in which both judges concur: —

1. That the act of Congress of the 3d of June, 1864, entitled An Act to provide a National Currency, etc. conferred no au-

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thority upon the cashier of the defendant bank to certify, as good, the several checks described in the first eight counts of the declaration. 13 Stat. at Large, 99. §§ 8 and 23.

2. That the power to certify the checks of third persons, in behalf of the corporation, is not inherent in the office of a cashier of a national bank, nor is the exercise of such a power within the scope of his usual and ordinary duties. *United States v. The City Bank of Columbus*, 21 How. 56; *Miner et al. v. The Mechanics' Bank of Alexandria*, 1 Pet. 71; *Bank of United States v. Dunn*, 6 Pet. 51; *Fleckner v. United States Bank*, 8 Wheat. 360; *Osborn v. Bank of United States*, 9 Wheat. 738; *Mussey v. The Eagle Bank*, 9 Met. 306; *Kirk v. Bell*, 16 Q. B. 290; Same Case, 12 Eng. L. & Eq. 389; *Hoyt v. Thompson*, 1 Seld. 320; *Bank Comers v. Bank of Buffalo*, 6 Pease, 497; 1 Am. Lea. Cas. 460 – 472.

Recent cases decided in the courts of New York, referred to by the plaintiffs, do not affect the question, as they were founded upon either an admission in the pleadings, or an agreed statement of facts, admitting that the usage was that cashiers might certify checks, or on proof that such had been the practice of different banks. Whether the teller had authority from the bank to certify checks was not a question in the case of *Willets v. The Phoenix Bank*, 2 Duer, 129, because the opinion of the court shows that the complaint averred, and the answer admitted, that the certifying the checks was the act of the defendant bank. Slight examination also of the case of *The Farmers and Mechanics' Bank of Kent County v. The Butchers and Drovers' Bank*, 4 Duer, 219, will show that it contains nothing to support the theory that the cashier of the defendant bank had authority to certify as good the checks in question in this case. The statement of the court in that case was that the teller “had general authority to certify checks,” but the exception to his acts was, that his general authority in that behalf was qualified by directions not to give such certificates, unless the customer had funds. Contrary to those instructions, the charge of the defendant bank was, that he colluded with a customer, and certified his checks, when the customer had no funds on deposit. The decision of the

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court was, that the bank was liable for the amount of the check, as it appeared beyond controversy that the plaintiff was a *bona fide* holder of the checks without notice. *The Farmers and Mechanics' Bank of Kent County v. The Butchers and Drovers' Bank*, 14 N. Y. 623 ; Same Case, 16 N. Y. 125.

Support to the theory of the plaintiffs cannot be drawn from the case of *Clafin v. The Farmers and Citizens' Bank*, 25 N. Y. 293, as the admitted fact in that case was, that the president who certified the checks had a general authority to that effect, but the checks as certified were held to be void, even in the hands of a *bona fide* holder, because they were checks drawn by himself. Checks on a bank marked "good," say the court in the case of *Girard Bank v. The Bank of Penn Township*, 39 Penn. St. 99, are to be regarded as evidences of deposit to the credit of the holder ; but the authority of the president, cashier, or any other officer of the bank to make such a certificate was not made a question in the case, and was not decided by the court. By the true construction of the seventeenth article of the by-laws, it confers no such power upon the cashier of the bank, and there is no evidence in the case that the directors or the corporation ever authorized the acts of the cashier in making the certificates upon the checks under consideration. Proof of any such usage on the part of the defendant bank, or of any such antecedent practice by their cashier, is entirely wanting, and the evidence as to the usage of other banks fails altogether to show that the cashiers of the other banks in this city, or any one of them, are accustomed to certify checks as good either with or without funds in the bank.

Twenty-two of the cashiers of the national banks located and doing business in Boston were examined by the plaintiffs, and not one of them testified that he, as cashier of a bank organized under the act of Congress, certified a check of a third person as good. None testified affirmatively in that respect, but one, if no more, testified that he never had given such a certificate. They all concur that as cashiers they borrow money for their respective banks whenever the bank is in want of money, and give the check of the bank for the amount, and sign it as cashier. Their



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testimony also is, that they buy and sell New York funds as the agents of their respective banks. Those selling give a draft on New York, signing it as cashier, and those buying give checks, or pay for the same in legal-tender notes or other national currency, or other current funds. The plaintiffs also proved that the cashier of the defendant bank prior to the 23d of February, 1867, borrowed large sums of money of the Second National Bank in Boston, on checks signed by him as cashier; and the cashier of the latter bank testified that he knew no one in the several transactions but the cashier who gave the checks. Giving full effect to testimony as to usage, it only proves that there is a usage among the banks in this city that the cashiers may borrow money of other banks than their own in the settlement of balances through the clearing-house, and may sign the checks given for the same in behalf of their respective banks, and that they may also buy and sell New York funds in the manner before explained. But the opinion of the court is, that the evidence introduced to show usage has no tendency to show that there is any usage among the banks in this city that the cashier of a national bank may certify checks as in this case. The better opinion is, that a power evidenced by usage must be considered as defined and limited by the usage. Strong doubts are entertained by the court, even if it appeared that such a usage prevailed among the other banks in the city, whether it could be regarded as evidence that the cashier of the defendant bank had any such authority, unless it appeared that the defendant bank had in some way directly or indirectly sanctioned the usage; but it is not necessary to decide that question at the present time. Be that as it may, it is nevertheless clear that usage cannot make a contract, or vary or enlarge one, as made by the parties. Evidence of usage is admissible to explain what is doubtful, but it is not admissible to contradict what is plain. *Insurance Companies v. Wright*, 1 Wall. 470; *Bliven et al. v. New England Screw Company*, 23 How. 431; *Schooner Reeside*, 2 Sumn. 567; *Dickinson v. Gay*, 7 Allen, 37; *Dodd et al. v. Farlow et al.*, 11 Allen, 428.

Viewed in any light, the court is of the opinion that there is no evidence of usage in this case which would warrant the jury

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in finding that the cashier of the defendant bank had any authority whatever to bind the bank by his certificates that the checks were good. The argument of the plaintiffs also is, that the certificates of the cashier import on their face that he was authorized to exercise that power in behalf of the bank. Stated in other words, the proposition is, that the certificate affords a *prima facie* presumption of authority in the officer to make the certificate, but the court is of a different opinion, as the proposition, if admitted, would enable the cashier to exercise all the powers vested in the directors by the act of Congress, to which reference has been made. Payments made, or money received over the counter of the bank by the cashier, are doubtless within that rule, and so perhaps are any other acts of the cashier, within the scope of his usual and ordinary duties. But the doctrine cannot be applied to the acts of the cashier outside of his usual and ordinary duties, without establishing a rule which will enable every cashier at will to absorb all the powers of the directors, and to render null the most important features of the eighth section of the act of Congress providing for a national currency. Doubtless the decision of the court in the case of the *Bank of Vergennes v. Warren et al.*, 7 Hill, 91, was in fact founded on that distinction; but if it was the intention of the court to give it a wider application, it is clear that it is contrary to the decisions of the Supreme Court of the United States, and cannot be favored by this court.

The ninth count of the declaration is for goods sold and delivered by the plaintiff bank to the defendant bank; but the court decides that there is no evidence in the case which would warrant the jury in finding that the plaintiff bank ever sold the gold certificates and the coin, or either of the same, to the defendant bank or to the cashier thereof in their behalf, as alleged in that count.

Assuming that the propositions stated are correct, then it necessarily follows that the plaintiffs have no cause of action under the tenth and eleventh counts of the declaration. They have not introduced any evidence in the case which would warrant the jury in finding a verdict in their favor under those counts. Motion granted.

## UNITED STATES v. JOHN CRANE.

## BEFORE CLIFFORD AND LOWELL, JJ.

Under § 44 of the Bankrupt Act of March, 1867, it was objected to an indictment that it did not sufficiently allege that the accused had attempted to account for certain of his property by fictitious losses, and that he had secreted and concealed certain portions of his property, after the commencement of proceedings in bankruptcy. The indictment alleged that the defendant was lawfully adjudged a bankrupt; that after commencement of proceedings in bankruptcy he was required by the District Court to submit to examination on oath as to the disposal and condition of his property; that such examination was held; that the bankrupt was sworn to make true answers; and that he attempted to account for a certain item of property, with intent to defraud his creditors, by a fictitious loss. *Held*, that the objection as to the sufficiency of the allegation could not be sustained.

Section 38 of the act provides that the filing of a petition for adjudication in bankruptcy, either by the debtor or by a creditor, upon which an order may be issued by the court or by the register, shall be deemed the commencement of proceedings in bankruptcy.

An averment in the indictment that the defendant was lawfully adjudged a bankrupt was sufficient to admit the record.

Such an averment is only a preliminary allegation to let in the record of the examination, which is itself a proceeding in bankruptcy.

The objection that the averment of a conclusion is insufficient is not applicable to the one in this case, which was only essential to lay the foundation for the admission of the record to which it refers.

If this were not so, then it would be necessary to set out the whole record in the indictment.

Where in an indictment it was alleged in substance that the property falsely accounted for belonged to the bankrupt and was assignable under the Bankrupt Act, *held*, that such averment was equivalent to charging that the property was that of the defendant.

**MOTION in arrest of judgment.** Indictment under § 44 of the Bankrupt Act of March 2, 1867, charging the defendant with attempting to account for a certain part of his property by fictitious losses, and for secreting certain of his property after the commencement of proceedings in bankruptcy.

The following causes were assigned: —

*First.* It is not alleged, nor does it appear in either count of said indictment, that he has committed an offence of which this court has jurisdiction.

*Second.* It is not alleged, and it does not appear, that the omissions charged in the first count of the indictment, or that the attempt to account for fifteen thousand six hundred and eighty-three dollars by a fictitious loss thereof charged in the

second count, or that the concealment charged in the third and last count, was after the commencement of proceedings in bankruptcy.

*Third.* It is not alleged, and it does not appear, that the omission or either of the acts with which he is charged in said indictment was after the commencement of legal proceedings in bankruptcy.

*Fourth.* If the second counts be, in other respects, sufficient, it is not alleged that the sum of fifteen thousand six hundred and eighty-three dollars was the property of him, the said Crane.

*Fifth.* The said indictment and each and all the counts thereof are otherwise defective and insufficient to support or warrant a judgment against him.

*G. S. Hillard*, U. S. Attorney.

*H. W. Paine* and *H. W. Muzzey*, for defendant.

CLIFFORD, J. The indictment is founded upon the forty-fourth section of the act of Congress of the second of March, 1867, entitled "An Act to establish a Uniform System of Bankruptcy throughout the United States." 14 Stat. at Large, 539.

By that section it is provided, among other things, that if any debtor or bankrupt shall, after the commencement of proceedings in bankruptcy, secrete or conceal any property belonging to the estate . . . with intent to prevent it from coming into the possession of the assignee in bankruptcy, . . . or shall, with intent to defraud, wilfully and fraudulently conceal from his assignee or omit from his schedule any property or effects whatsoever, . . . or shall attempt to account for any of his property by fictitious losses or expenses, . . . he shall be deemed guilty of a misdemeanor, etc. 14 Stat. at Large, 539.

The charge in the first count of the indictment is that the defendant at Boston on the 19th of February, 1868, wilfully and fraudulently, and with intent to defraud his creditors, did omit from the schedule annexed to his petition in bankruptcy, purporting to contain an inventory of all his estate, real and personal, a large part of his personal property, assignable under said act, to wit, thirty thousand dollars in money, together with a large amount of goods and chattels.

The second count is drawn upon that clause of the same section which makes it an offence to attempt to account for any of his property by fictitious losses or expenses, as is more fully set forth in the indictment.

The third count is drawn on that clause of the section which provides for the punishment of any such debtor or bankrupt, who, after the commencement of proceedings in bankruptcy, secretes or conceals any property belonging to his estate, with intent to prevent it from coming into the possession of the assignee in bankruptcy.

Motions in arrest of judgment in criminal cases are addressed to the entire indictment, so that in cases where the indictment contains more than one count, if any one of the counts is good, the motion must be denied.

Strong doubts are entertained whether the first count can be supported; but it is unnecessary to decide the point, as the court is of the opinion that the allegations of the second and third counts are sufficient.

Special consideration need not be bestowed upon the first cause assigned in the motion, as the supposed objections therein specified are more definitely set forth in the second and third causes, and those two causes may be considered together.

The precise import of the objection is that the counts, or either of them, do not show definite and sufficient allegations; that the several supposed criminal acts therein imputed to the defendant were done and committed by him after the commencement of the proceedings in bankruptcy.

The argument is, that the allegation that the proceedings in bankruptcy were previously commenced is essential in the indictment, because the acts imputed to the defendant were not criminal unless they were done and committed after those proceedings were commenced; and it is doubtless true that the proposition is well founded. Suppose that to be so, still the inquiry remains whether the allegations as made are sufficient.

The substance of the allegations of the second count upon that subject is, that the defendant, on his own petition, filed in said District Court on the 19th of February, 1868, was lawfully ad-

judged a bankrupt, and after the commencement of proceedings in bankruptcy in the said case, he was required by the said District Court to attend and submit to an examination on oath upon all matters relating to the disposal and condition of his property, and that he did submit to such examination in pursuance of such requirements, and was then and there duly sworn to make true answers to such questions as should be propounded to him in reference to the disposal of his property and estate. Such is the substance of the allegation in respect to the commencement of the proceedings ; but the grand jury go on to allege that he was then and there inquired of as to the disposal of fifteen thousand six hundred and eighty-three dollars previously received by him on a certain day, therein specified ; and the averment is, that he then and there, with intent to defraud his creditors, falsely and fraudulently attempted to account for that sum by a fictitious loss of the same, as therein more fully set forth and alleged. The direct provision of the thirty-eighth section is, that the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf or by any creditor against a debtor, upon which an order may be issued by the court or by a register in the manner provided in section four, shall be deemed and taken to be the commencement of proceedings in bankruptcy under that act. 14 Stat. at Large, 35. Doubt cannot be entertained that the averment that the defendant was lawfully adjudged a bankrupt, as therein alleged, was sufficient to admit the record, or an exemplified copy thereof, in evidence ; and inasmuch as the act alleged could not be proved in any other way, the court is of the opinion that the allegation in the form pleaded is sufficient. Taken in any point of view, it is only a preliminary allegation, to let in the record of the examination of the bankrupt, which is itself a proceeding in bankruptcy.

An averment of a conclusion is said to be insufficient ; but the rule has many exceptions, and cannot properly be applied to an allegation like the one under consideration, which is only essential as laying the foundation for the admission of the record to which it refers. Unless that be the rule in this case, then it was necessary to set out the whole record, which cannot be admitted,

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as it would require unnecessary complexity in indictments under this act of Congress without any possible advantage to the accused. Objection was not made to the admissibility of the record, under this allegation, and certainly, where it was received in evidence, every right of the accused was as effectually protected as if the record had been copied into the indictment.

Suffice it to say, without entering more into detail, that the court is of the opinion that neither the second nor the third cause assigned in support of the motion is well founded, whether applied to the second or third count.

The ground assumed in the fourth cause assigned is, that it is not alleged in the second count that the money therein described was the property of the defendant. But it is therein alleged, in substance and effect, that the money belonged to him, and was assignable under the Bankrupt Act.

Motion overruled.

Judgment on the verdict.

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**RHODE ISLAND DISTRICT.**

**NOVEMBER TERM, 1868.**

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**EDWARD N. BATES v. THE EQUITABLE FIRE AND MARINE INSURANCE COMPANY.**

A stock of sugars was insured under a time-policy, which contained the condition that if the property should be sold or conveyed in whole or in part, or if the policy should be assigned without the consent of the company, the risk should cease; but if the assured should sell the property, or part thereof, before the expiration of the policy, the same might be continued for the benefit of the purchaser, if the company gave their consent, to be evidenced by a certificate of the fact or by indorsement on the policy. Shortly after the date of the policy the assured sold the property to the plaintiff, and on the day of the completion of the delivery indorsed the policy to him as follows: "Payable in case of loss to Edward C. Bates." The policy was sent to the defendants with the request that they would approve the indorsement. It was approved in the following



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terms: "Consent is hereby given to the above indorsement." At the time of the loss the plaintiff had on hand a quantity of sugars equal to that which was owned by the assured at the date of the policy. *Held*, that the indorsements on the back of the policy were not a compliance with the conditions of the policy in case of sale. Under those conditions the policy would not continue for the benefit of a purchaser, and the consent of the company to the change of ownership must be evidenced substantially as required in the conditional clause.

Upon sale of the property without the antecedent consent of the company the risk ceased, and the policy became void, unless the consent of the company thereto was subsequently obtained.

The purchase was made, but the consent of the company to the transfer was not obtained, and they had no notice of it prior to the loss. They consented, in case the property of the assured was destroyed, they would pay the amount to the plaintiff, not that the policy should continue for the benefit of any one other than the insured.

ASSUMPSIT upon a policy of insurance. Plea the general issue, and verdict for the plaintiff, subject to the opinion of the court upon questions of law, reserved at the trial. The policy was dated October 11, 1861, and it was issued to William D. Philbrook in the sum of \$3,000, for one year from date, on a stock of sugar, raw, wrought, and in process, contained in the frame building, with composition roof, occupied by the assured, for refining sugar, situated on Sargent's Wharf, in Boston, Mass. The terms of the policy material to be noticed were, "that if the situation of the property or the circumstances affecting the risk should be during the existence of the policy altered or changed, by or through the advice, consent, or agency of the assured, or if said property should be sold, or conveyed in whole or in part, or if the policy should be assigned, without the consent of the company, . . . then, and in every such case, the risk assumed should cease, and the policy become void.

But the company agreed that if the assured should sell the property, or any part thereof, before the expiration of the policy, a proportion of the premium received should be repaid, upon receiving notice of such sale, before loss, reserving, however, three months' premium on the sum insured, over and above the amount which would be due at the time of receiving such notice; or the policy might continue for the benefit of such purchaser if the company gave their consent thereto. Consent was to be evidenced by a certificate of the fact or by indorsement on the policy. The execution of the policy was admitted,

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and the evidence showed that the assured was at that date the owner of \$60,000 or \$70,000 worth of sugars on that wharf, of the description specified in the policy. Shortly after the date of the policy the plaintiff purchased the sugars of the assured, and the same were all delivered to him, pursuant to orders of the seller, on or before November 23 following.

Delivery of the sugars to the plaintiff was completed on that day, and on the same day the assured indorsed the policy to the plaintiff in the terms following, to wit, "Payable in case of loss to Edward C. Bates," and signed the same and delivered the policy to the plaintiff. The proofs also showed, that he made the indorsement in pursuance of the contract of sale, and that the premium for the unexpired portion of the term of the policy was taken into account between the parties in making the contract. On the 28th of the same month the policy with the indorsement thereon, signed by the assured, was enclosed to the president of the company, requesting him to approve of the indorsement; and on the following day the policy was returned indorsed, "Consent is hereby given to the above indorsement," and the same was signed, "Equitable Insurance Company, Fred W. Arnold Secretary."

Subsequent to the purchase and delivery of the sugars, the plaintiff carried on the business of refining sugars at that refinery, substantially in the same way that the business prior to that time had been conducted by his vendor, and at the time of the loss he had on hand a quantity of sugars equal to that which was owned by the assured at the date of his policy, and of the same descriptions. During the night of the 24th of February, 1862, the entire stock of sugars in that refinery was destroyed by fire. Due notice was given of the loss by the plaintiff on the following day, and two days later the defendants admitted the receipt of the notice, but declined to pay the amount, upon the ground that the assured ceased to be the owner of the property before the loss, and that they had never assented to any change of ownership in the property insured. They set up the same defence at the trial, but the court overruled it and directed a verdict for the plaintiff, reserving the question for further consideration.

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*E. Metcalf* and *C. B. Goodrich*, for plaintiff.

*Geo. H. Browne*, for defendants.

CLIFFORD, J. Time-policies upon a stock in trade, especially where they cover a considerable period of time, and where from the nature of the business it appears that the parties must have understood that the stock would be continually changing, apply to goods in the place of business from time to time, as purchases are made to supply the place of goods sold in the usual and regular course of business within the lifetime of the policy. 1 Phil. on Ins. §§ 489–491; Angel on Ins. § 203; *Lane v. Maine Mut. F. Ins. Co.*, 12 Me. 44; *Hooper v. Hudson River F. Ins. Co.*, 17 N. Y. 426.

Partial sales of the stock, therefore, under such a policy, if the vacuum is regularly supplied by new purchases of equal value, and of the same description of goods, will not render the policy void, even though the entire stock may change before the loss occurs. Unless the rule were so, a policy of insurance upon a stock in trade for any considerable period of time would cease to be an indemnity against loss. Such partial sales in the usual course of business are not prohibited by the terms of the policy in this case. Both parties knew that the sugars on hand were to be manufactured and that the product was to be sold, and that the unmanufactured sugars were to be supplied by new purchases to keep the stock good, and it is not pretended by the defendants that any such sales and purchases had the effect to impair the right of the assured to recover on the policy. On the other hand, the plaintiff concedes that in case of the sale of the property, such as was made by the assured to the plaintiff, the risk would cease and the policy become void, unless the company gave their consent thereto within the true intent and meaning of that condition in the policy. Whether conceded or not, it is clear that without such consent the policy would not continue, for the benefit of the purchaser, and it is equally clear that the consent, to be valid, must be evidenced substantially as required in that clause of the policy.

Parties make their own contracts, and courts are bound by their terms and conditions. The express words of the condition

are, that "the policy (in case of a sale) may continue for the benefit of the purchaser if this company give their consent thereto," to be evidenced by a "certificate of the fact or by indorsement on this policy."

None of these views are directly controverted by the plaintiff, but he insists that the indorsement appearing on the back of the policy is a substantial compliance with the condition in that behalf, as before recited, which is the principal question between the parties.

Reference is made by the plaintiff to the case of *Hooper v. The Hudson River Railroad*, 17 N. Y. 426, as supporting his views, that the indorsement on the policy in this case affords sufficient evidence that the defendants had notice that he had purchased the property of the assured. Careful examination of that case, however, will show that it is not analogous, and that it does not support the proposition as applied to the case before the court. The statement of the case shows that the entire stock in trade of the assured was sold at auction, and that the plaintiff in the suit on the policy became the purchaser, and on the same day he applied to the insurance company and obtained their consent in writing, indorsed on the policy that the interests of the assured in the policy might be assigned to him, and he subsequently took such an assignment in writing before the loss.

Right to the benefit of the policy was denied, because the purchaser did not disclose his interest when he applied to the company for their consent that the policy might be transferred, but the court held that the act of applying for consent that the policy might be assigned was notice to the company that the applicant had acquired or was about to acquire, some interest in the property insured.

Destitute as this case is of every feature of resemblance to that one, it hardly seems necessary to point out the differences. Suffice it to say, that in this case there was no application for consent that the policy might be assigned; no consent to that effect was ever given, nor did the assured ever execute any assignment of the policy.

Sale of the property by the assured without any antecedent

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consent of the company is proved and admitted, and of course the risk ceased and the policy became void at that time, unless the purchaser subsequently secured the consent of the company thereto, as required by the terms of the policy. *Carpenter v. Prov. Wash. Ins. Co.*, 16 Pet. 502; *Foster v. Equitable Ins. Co.*, 2 Gray, 216; *Grosvenor v. Atlantic F. Ins. Co.*, 17 N. Y. 391; *Loring v. Man'j'rs Ins. Co.*, 8 Gray, 29.

The next inquiry is, what is the true meaning and legal effect of the indorsement in this case, to which the defendants consented through their secretary?

In the case of *Grosvenor v. Atlantic F. Ins. Co.*, 17 N. Y. 391, the direct adjudication was that where a fire policy names the owner as the person insured, and declares that the damages in case of loss shall be payable to another person, therein named as mortgagee, the latter cannot recover in case of a breach of the conditions of the policy by the mortgagor. In such case the contract is with the mortgagor, and for the insurance of his interest, and the mortgagee can recover only where the mortgagor could have done so, had the money been payable to himself instead of being payable for his benefit to the mortgagee. *Insurance Co. v. Chase*, 5 Wall, 516.

The present case is no stronger than those cases where the appointee to receive money in case the property of the assured is lost, is named in the policy itself instead of being appointed by an indorsement on the back. Neither such a stipulation in the policy nor such an indorsement on the back of the policy amounts to an assignment of the policy, or operates as a transfer of the property insured.

Decided cases to this point are quite numerous, and they are all one way. *Hale v. M. M. F. Ins. Co.*, 6 Gray, 169; *Young et al. v. Eagle F. Ins. Co.*, 14 Gray, 153; *Fogg v. Middlesex F. Ins. Co.*, 10 Cush. 337; *Ketchum v. Protective Ins. Co.*, 1 Allen, N. B. 136; *Loring v. M. Ins. Co.*, 8 Gray, 29.

The argument of the plaintiff is, that the application to the defendants for consent that the sum insured in case of loss should be payable to him, was notice of the sale of the property and of the assignment of the policy; but it is clear that neither branch

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of the proposition can be sustained. *Fogg v. Middlesex Ins. Co.*, 10 Cush. 348; *Insurance Co. v. Chase*, 5 Wall, 516.

Viewed in any light, the plaintiff cannot recover. Purchase of the property insured was made by the plaintiff, but he did not procure the consent of the company to the sale, and they had no notice of the transfer prior to the loss. They consented, in case the property of the assured was destroyed, that they would pay the amount to the plaintiff, but they never consented that the policy should continue for the benefit of any one except the insured.

Verdict set aside.

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## MASSACHUSETTS DISTRICT.

MAY TERM, 1869.

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UNITED STATES v. JULIUS F. HARTWELL, CHARLES MELLEN, AND  
CHARLES H WARD.

BEFORE CLIFFORD AND LOWELL, JJ.

An officer of the United States charged with the safe-keeping of public moneys was indicted as principal defendant under the act of August 6, 1846, for loaning such money so intrusted to him to certain persons indicted jointly with him. Before the jury were empanelled he pleaded *nolo contendere*. Certain confessions of his that he had loaned the public money were offered in evidence. *Held*, they were properly admitted to show that he had unlawfully loaned a portion of the public money, but not to prove that the other defendants ever advised or participated in the criminal acts. The other defendants were charged with advising and participating in the felonious acts, but neither the declarations nor acts of the principal defendant could be admitted to prove anything against them.

The defendants before the court, after the principal defendant's plea, were held to be principals and not accessaries.

Misdemeanors do not admit of accessaries either before or after the fact, and the general rule is, that whatsoever will make a party an accessory before fact in felony will make him a principal in misdemeanor if properly charged as such.

The offence charged in this case was a misdemeanor, but it would make no difference if it were held to be a felony, as the defendants before the court were confederates of the principal defendant in the commission of the crime.

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He loaned them the public moneys, and they borrowed them knowing him to be an officer of the United States charged with the custody of the moneys.

Acts, conduct, and declarations of each confederate made during the pendency of a criminal enterprise are competent evidence against all concerned in it ; but confessions subsequent to the crime can affect as evidence only a party by whom they were made.

When the accessory is tried with the principal, the confessions of the principal are admissible to prove his own guilt, and where the principal confesses by pleading guilty and retiring from the bar under his recognizance, the record of the conviction of the principal was properly introduced, and was *prima facie* evidence of his guilt at the trial of the other defendants, and his confessions to show that he was rightfully convicted.

Evidence of his confessions to prove the guilt of the principal cannot be admitted under an indictment against the accessory, unless the guilt or antecedent conviction of the principal is alleged in the indictment.

Conviction may accrue either by confession and pleading guilty, or by being found guilty.

Where the guilt of the principal was admitted at the trial of the accessories, even if the confessions of the principal were improperly admitted, still a motion for new trial ought not to prevail because the record of the conviction of the principal was properly introduced and was *prima facie* evidence of his guilt at the trial of the other defendants.

The legal effect of the plea of "*nolo contendere*" and "guilty" is the same as regards all the proceedings on the indictment.

If the defendants in this indictment had been charged as accessories to the offence alleged against the principal, still the confessions of the principal were properly admitted to prove that he committed the offence.

OFFICERS and other persons charged with the safe-keeping, transfer, and disbursement of the public moneys are required, by the act of the 6th of August, 1846, to keep an accurate entry of each sum received, and of each payment or transfer, and the sixteenth section of the act also provides that if any one of the said officers shall loan any portion of the public moneys intrusted to him for safe-keeping, disbursement, or transfer, every such act shall be deemed and adjudged to be an embezzlement of so much of the said moneys as shall be thus loaned, which is therein declared to be a felony ; and the same section further provides that all persons advising or participating in such act being convicted thereof before any court of the United States of competent jurisdiction shall be punished as therein provided. 9 Stat. at Large, 63.

Founded on that provision the indictment in this case contained nine counts, charging in substance and effect that the first-named defendant, at the times therein mentioned, was an officer in the office of the assistant treasurer at Boston, in the



Commonwealth of Massachusetts, and that he, as such officer, then and there loaned large sums of the public moneys deposited in that office to the firm of Mellen, Ward, & Co. and that Mellen and Ward, the other two defendants named in the indictment, then and there advised and participated in those several unlawful and criminal acts of loaning such portions of the public moneys so intrusted to that officer for safe-keeping, disbursement, and transfer.

Subsequent to the filing of the indictment, the defendants were arraigned and severally pleaded not guilty, but, when they were set at the bar for trial on a later day in the same term, the principal defendant, Hartwell, retracted his plea of not guilty, and pleaded *nolo contendere*, which was accepted by the district attorney, and, it appearing that his recognizance was satisfactory, he was allowed to retire from the bar and the jury were empanelled for the trial of the other defendants. Evidence was introduced by the district attorney, showing that the public moneys of the United States, intrusted to the assistant treasurer at Boston, in this Commonwealth, were kept in the vault of the depository designated for that purpose; that the room so designated and used was about ten feet square, and was divided into two apartments separated by a passage-way with partitions on each side of the passage. Gold was kept in the apartment on the right-hand side of the passage in boxes, some of which contained five thousand dollars, and others only one thousand dollars, and there were also considerable quantities of silver coins and currency kept in that apartment of the vault. Six or seven millions of gold coin, sealed up in bags, were also kept in the other apartment on the other side of the passage-way, and there was a door from the passage-way into each of those apartments. Hartwell was paying teller in that office, and as such had access to both apartments of the depository. The tendency of the testimony was to show that the amount of the public moneys kept there during the period laid in the indictment was seldom or never less than twelve millions of dollars at any one time. The substantial charge of the indictment is, that the principal defendant loaned large sums of

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the public moneys intrusted to him for safe-keeping, transfer, and disbursement, and that the other two defendants, together with one Edward Carter, who did not appear, advised and participated in that unlawful act. The docket entries show that the principal defendant pleaded *nolo contendere* before the jury were empanelled, and those entries were introduced in evidence during the trial. The principal witness for the government was the chief clerk in the office of the assistant treasurer, who was called and examined by the district attorney. He testified, among other things, that Hartwell, in the afternoon of the 28th of February, 1867, stated to the witness that he wished to have some conversation with him, and that they went into the right-hand apartment of the vault for that purpose, and while there he told the witness that he had been loaning the public moneys to Mellen, Ward, & Co., as charged in the indictment. Seasonable objection was made by the defendants on trial to the introduction of that testimony, upon the ground that it was hearsay and inadmissible as against them for any purpose. They conceded that the testimony would be admissible if Hartwell was on trial, to prove his guilt as against himself, but they denied that the evidence could be properly admitted, even if the principal were on trial, to prove his guilt as against the defendants charged as having advised and participated in the criminal acts alleged against the principal defendant. But the court ruled that such evidences, if all the defendants were on trial at the same time, would be admissible to prove the guilt of the principal, both as against himself and as against the other defendants, and that the same rule must prevail as to the admissibility of the evidence where those charged with having advised and participated in the criminal acts of the principal are separately tried in consequence of the previous conviction of the principal, or because he had pleaded guilty or *nolo contendere*, as in this case. Repeated confessions of the principal under that ruling were admitted in evidence to the effect that he had loaned the public moneys intrusted to him for safe-keeping, transfer, and disbursement, as alleged in the indictment, but the court ruled at the same time, and subsequently instructed the jury to

the same effect, that none of the confessions, admissions, or statements of the principal defendant were admissible to prove that the defendants on trial ever advised or participated in those criminal acts. Detailed statements of the confessions of the principal were given by several witnesses subject to the same objection, which were overruled by the court upon the same ground, and they were admitted in evidence for the same special purpose. Much other evidence was introduced, and the jury under the court's instructions returned a verdict of guilty against both defendants. Exceptions were duly taken to the rulings and instructions, and the case came before the court upon a motion for new trial.

*G. S. Hillard*, U. S. District Attorney.

*Benjamin F. Thomas, G. C. Shattuck, H. W. Paine*, for defendants.

CLIFFORD, J. The grounds of the motion are as follows: 1. Because the confessions of the principal defendant were improperly admitted to prove that he unlawfully loaned certain portions of the public moneys as alleged in the indictment. 2. Because the verdict was not warranted by the law and the evidence in the case. Before proceeding to consider the exceptions to the rulings and the instructions of the court, it becomes necessary to examine the charge as laid in the indictment, and to ascertain its precise character as defined in the act of Congress. Briefly stated, the offence charged against the principal defendant is, that he unlawfully and feloniously loaned certain portions of the public moneys intrusted to him for safe-keeping, transfer, and disbursement, to the other three defendants therein named; but the charge against the other defendants is, that they then and there advised and participated in that unlawful and felonious act. Neither the acts nor the declarations of the principal were admitted in evidence to prove anything which was charged against the other defendants. They were charged with having advised and participated in the unlawful and felonious act committed by the principal, but the court expressly ruled that neither the acts, conduct, nor declarations of the principal were admissible to prove anything charged against them in the indictment. The express

ruling of the court was that the confessions of the principal defendant were admissible to prove his own criminal act as laid in the indictment, but that they were not admissible to prove anything charged against the other defendants, and the limitation contained in the ruling of the court was also embodied in the instructions given to the jury. Loaning the public moneys was the charge against the principal, and the court admitted his confessions to prove that charge, but ruled that neither the acts nor the confessions of the principal were admissible to prove the charge as laid in the indictment against the defendants on trial. None of these suggestions are controverted, but the theory of the defendants is, that the allegations of the indictment create the technical relation of principal and accessory, as between the party alleged to have loaned the public moneys, and the defendants who are charged with having advised and participated in that unlawful and felonious act as defined in the act of Congress. Theories are often assumed because they are plausible, when, upon a closer examination, it appears that in point of fact they have no foundation whatever. The present theory as assumed in argument by the defendants probably has its foundation in the analogy between the word "advising" as used in the act of Congress on which the indictment is founded, and the word "counselling" as usually employed in defining the meaning of an accessory to a felony before the fact as understood at common law. But there are at least two difficulties in the way of that theory as applied to this case which cannot be overcome: 1. The statute offence of loaning the public moneys was not a felony at common law, and the offence charged against the defendants of having advised and participated in that act is not declared to be a felony by the act of Congress. 2. The second difficulty in the way of the theory is, that, by the true construction of the provision defining the offence, the defendants before the court are principals and not merely accessories, as supposed in the proposition. Aiders and abettors were formerly defined to be accessories at the fact, and the rule was, that they could not be tried until the principal had been convicted or outlawed; but it has been long settled that all those who are present, aiding and abetting, when a felony is com-

mitted, are principals either in the first or second degree, and if in the second degree, that they may be arraigned and tried before the principal in the first degree, and that they may be convicted even though the party charged as principal in the first degree is acquitted. Foster, Cr. L. 347; Ros. Cr. Ev. 214; *Taylor's case*, 1 Leach, 360; *Rex v. Towle et al.*, Russ. & R. 314; *Rex v. Perkins*, 2 Den. C. C. 458. An accessory, says Blackstone, is he who is not the chief actor in the offence nor present at the time, but is in some way concerned therein, either before or after the fact committed. 4 Bl. Com. 34. Accessories before the fact are those who, being absent at the time the crime is committed, yet procure, counsel, or command another to commit it. 1 Hale P. C. 615. The absence of the party also is necessarily implied in the definition of an accessory after the fact, who is defined to be one who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. 4 Bl. Com. 37; 1 Hale P. C. 618. Persons participating in the commission of a crime are as much principals if they are present, aiding and abetting it, as those who are the immediate perpetrators of the act, differing only in degree. Nor is actual presence necessary if it appears that all were engaged in the common design, as when one commits the offence and another keeps watch to prevent surprise or to give warning or to afford relief. Misdemeanors do not admit of accessories either before or after the fact, but the general rule is that whatsoever will make a party an accessory before fact in felony will make him a principal in misdemeanor if he is properly charged as such in the indictment. *State v. Lynburn*, 2 Brev. 397.

The better opinion is that the offence charged against the defendants before the court is a misdemeanor, but it would make no difference if it were held to be a felony, as the charge laid in the indictment implies and the evidence introduced at the trial shows, that they were confederates of the principal defendant in the commission of the offence with which he was charged. He loaned the public moneys to them, or to their firm, and they borrowed or received the same from him, knowing that he was an officer of the United States, intrusted with the safe-keeping, transfer, and disbursement of such public moneys.

Co-operation between the principal and the other defendants is necessarily implied in the charge as laid in the indictment, and all the testimony introduced to prove that the firm of Mellen, Ward, & Co. received the moneys loaned by the principal, tended to show that the relation which they sustained to him was that of confederates in that unlawful and felonious act, and it is no answer to this view of the case to say that the confessions were admitted in evidence before that testimony was introduced, as that merely presents a question as to the order of proof which cannot be regarded as the proper foundation for a new trial. Acts, conduct, and declarations of each confederate made and done during the pendency of such a criminal enterprise are competent evidence against all engaged in it, as each is supposed to approve and sanction all that was done or said in furtherance of the common object. 1 Greenl. Ev. §§ 111 and 233. *U. S. v. Gooding*, 12 Wheat. 469. *Fur Co. v. U. S.*, 2 Pet. 365.

Such acts, conduct, and declarations are held to be admissible as part of the *res gestæ*, but subsequent narrations, confessions, or admissions stand upon a different principle, as the presumption is that they were not made in pursuance of a common design, and consequently they cannot be admitted as evidence to affect any one except the party by whom they were made. Viewed in the light of these suggestions, it is quite clear that the rulings of the court were as favorable to the defendants as they had any right to expect, as the confessions of the principal defendant were admitted for no other purpose than as evidence to prove that he loaned the public moneys as alleged in the indictment. But the defendants before the court insist that they were not indicted as principals but as accessaries to the unlawful and felonious acts committed by the principal defendant, and that, inasmuch as he pleaded *nolo contendere* and was allowed to retire from the bar, his confessions that he had loaned the public moneys as alleged in the indictment were not admissible in evidence even to prove his own guilt in the issue between them and the United States. Although we are not able to concur in that construction of the indictment, still we are quite willing to examine the exceptions and test the accuracy of

the rulings as applied to the case in that point of view, as it is the one which was taken of it by both parties at the trial. Suppose it to be true, as contended by the present defendants, that they are charged in the indictment as accessaries to the offence alleged against the principal defendant, the question then is, Were the confessions in question properly admitted in evidence to prove that he committed that offence? Argument for the defendants is, that those confessions were mere hearsay in the issue between them and the United States, but the district attorney contends that the rules of law required that the trial should be conducted after the principal defendant retired from the bar, just as it would have been if he had not retracted his plea of not guilty, and the three defendants then before the court had been tried together. Had the principal and the two accessaries then before the court been tried together, no doubt is entertained by the court that the confessions of the principal defendant would have been admissible to prove the charge against him as laid in the indictment.

Where the indictment includes the principal and the accessory, and they are tried together, the regular course for the prosecuting officer is to introduce all his substantive testimony against all the several parties on trial before they are required to state their defence, as in other cases where more than one defendant is on trial at the same time. Perfect protection is afforded to all concerned, in that state of the case, as well to the principal and accessory as to the government by the instructions of the court to the jury. They are instructed to consider the case of the principal defendant in the first place, and if they find him not guilty, that it is their duty also to acquit the accessory, but that if they find the principal defendant guilty, they must then proceed to examine the charge against the accessory, and determine from the evidence whether the charge against him is also sustained. 2 Hale, P. C. 222. The theory of the defendants is, that the question as to the guilt of the principal in the case supposed is presented in two separate issues; that the first issue is between the principal and the United States, and that the second is between the United States and the accessory; and the argument is, that the jury in the latter issue cannot



weigh the confessions of the principal defendant even as to his own guilt. Obvious error lies at the foundation of that theory, as it overlooks the fact that the charge against the accessory is in a certain sense ancillary to the offence committed by the principal. Take a case, for example, where it appears that the felony charged had never been committed; it could not be said within the meaning of the criminal law that one charged as an accessory before the fact procured, counselled, or commanded another to commit that felony, nor could it correctly be said that a person knew that a felony had been committed by another when nothing of the kind had occurred, nor that such person had received, relieved, comforted, or assisted the felon, as the charge is in the indictment against an accessory after the fact. Unaffected by statutory regulations, the offence of the accessory is not, as contended by the defendants, altogether distinct from that of the principal. Accessories before the statute 1 Ann, chap. 9, sec. 2, could never be tried without their own consent before the conviction or outlawry of the principal, unless they were tried together. 1 Chitt. Cr. L. 266. By that statute, however, it was enacted that whoever shall buy or receive stolen goods may be prosecuted for a misdemeanor, and punished by fine and imprisonment, though the principal felon be not convicted. Unaided by statute they may be indicted separately, but the accessory as a general rule cannot be tried until the principal has been convicted, or they may be jointly indicted, in which case they may be tried separately or at the same time, but if tried separately the trial of the principal is required to precede that of the accessory, as the latter cannot be tried until the principal has been convicted.

These remarks are sufficient to show that the offence of the accessory, as understood at common law, is not distinct from that of the principal, although the offence of the latter and every element of which it is composed are *res inter alios acta*, as applied to the accessory. Whenever the accessory is indicted before the principal has been convicted, it is necessary that the indictment against him, whether they are indicted separately or jointly, should allege the guilt of the principal, as the offence of the

accessary, even when charged as such before the fact, depends upon the principal's guilt, and is never to be regarded as complete unless the principal offence was actually committed. After the conviction of the principal it is not necessary in an indictment against the accessary to aver that the principal committed the felony, but it is sufficient to recite with certainty the record of the conviction, because the court will presume that everything in the former trial was rightly and properly transacted. 1 Chitt. Cr. L. 272, 273 ; Foster, Cr. L. 365 ; *Holmes v. Walsh*, 7 Term, 565.

The settled rule at common law was that the accessary could not be convicted until the guilt of the principal offender was established so that the principal must be first convicted or they must be indicted and tried together, and it is beyond all reasonable controversy that when they were tried together under the same indictment the voluntary confessions of the principal were competent evidence to prove his guilt. Deliberate confessions of guilt are among the most effectual proofs in the law, and that rule is as applicable to the party who made the confession when he is tried with others as when he is tried alone. 1 Greenl. Ev. §§ 215, 233 ; Ros. Cr. Ev. 37, 52. Evidence of that kind being legally admissible in the case, it is for the consideration of the jury, and their finding under the charge against the principal is at least equivalent to the record of his prior conviction, and is in fact conclusive unless the verdict is set aside on a motion for new trial. When the principal and accessary are tried together, the court will instruct the jury to consider the case of the principal first, but the jury cannot find him guilty and not guilty in the same trial, as they might do if the theory of the defendants is correct. Contradictory findings of that character would be absurd, and the fact that they might occur under the theory suggested affords strong ground to conclude that the theory itself is erroneous. Apply that rule, and cases might often arise where the jury would be constrained to find the principal defendant guilty as against himself, because he was proved to be guilty by competent testimony, and yet they would be obliged to find at the same time that the accessary was not guilty

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because the evidence in the case did not warrant them in finding as against the accessory that the principal offence had been committed. Such an absurdity cannot be sanctioned, and consequently the theory of the defendants must be rejected.

The next inquiry is, whether any different rule prevails in a case where the principal and accessory are joined in the same indictment, but the principal pleads guilty and is allowed to retire from the bar before sentence is passed. Conviction may accrue in two ways, either by the party confessing his offence and pleading guilty, or by his being found guilty by the verdict of a jury. 4 Bl. Com. 362. Omission to sentence the principal defendant cannot make any difference as to the effect of the plea, as it is well settled that the conviction of the principal is sufficient without any judgment to constitute *prima facie* evidence of his guilt in the trial of the accessory. 3 Greenl. Ev. § 46. *Com. v. Williamson*, 2 Vir. Cas. 211; *Horne Tooke's case*, 25 St. Tri. 449. Attempt was made at the argument to set up a distinction between the plea of *nolo contendere* and the plea of guilty, but the suggestion is entitled to no weight, as it is well settled that the legal effect of the former is the same as that of the latter, so far as regards all the proceedings on the indictment. *Com. v. Horton*, 9 Pick. 206. 1 Am. Cr. L. (4th ed.), § 533. No objection was made to the introduction of the minutes of the clerk, but as they were read subsequently to the objection made to the introduction of the testimony proving the confessions of the principal, it may be that the defendants regarded the testimony of the clerk as falling within the same objections. Conceding that to be so, then the exception before the court must be examined in two aspects. First, was the record of the conviction of the principal defendant admissible to prove that he had been convicted of the offence charged against him in the indictment; and secondly, were his confessions admissible in evidence to prove that he was rightfully convicted? Where the principal is convicted prior to the finding of the indictment against the accessory the record of his conviction is admissible by all the authorities to prove that fact, and to that extent it is conclusive, and cannot be contradicted. Authorities to support that proposition are unnecessary, but it is not conclu-

sive as against an accessory on trial that the principal defendant was guilty. The conviction appears to be evidence, says Mr. Roscoe, not only of the fact of the principal having been convicted, but also to be *prima facie* evidence that he was guilty of the offence of which he was so convicted, and the Supreme Court of Massachusetts decided that where the principal and accessory are joined in one indictment but are tried separately, the record of the conviction of the principal is *prima facie* evidence of his guilt, and that the burden of proof rests on the accessory to prove clearly that he ought not to have been convicted. Ros. Cr. Ev. 222. *Com. v. Knapp*, 10 Pick. 477.

The record of the conviction, says Foster, is evidence against the accessory sufficient to put him upon his defence, for it is founded on a legal presumption that everything in the former proceeding was rightly and properly transacted, but such a presumption must give way to facts manifestly and clearly proved. Foster, Cr. L. 365. Prior to the decision in the case of *Rex v. Turner*, 1 Moo. Cr. Cas. 347, the rule as stated by the Supreme Court of this State was universally regarded as correct. 1 Wharton, Am. Cr. L. § 149; 1 Stark. Ev. 726; 1 Russ on Cr. (7th Am. ed.) 42; 1 Chitt. Cr. L. 273; *State v. Ricker*, 29 Me. 87; *Simmons v. The State*, 4 Geo. R. 472; *Studstill v. The State*, 7 Geo. R. 11; *State v. Sims*, 2 Bailey (S. C.), 34; *State v. Crank*, 2 Bailey (S. C.), 74; *Ulmer v. The State*, 14 Ind. 52; *Rex v. Blick*, 4 C. & P. 428; *State v. Rand*, 33 N. H. 216; *People v. Buckland*, 13 Wend. 592; 2 Phil. on Ev. (ed. 1859), p. 49, note 273. Special reference is made to that note in the fourth American edition of Phillips's Evidence as the most satisfactory explanation of the discordant decisions to be found in any treatise upon the subject.

Several commentators, it must be admitted, have adopted the rule actually laid down in Turner's case without any qualification, and some have even given their sanction to what some of "the judges present at the time appeared to think" as represented by the reporter, upon a point not involved in the case submitted to their decision. The charge against the prisoner in that case was that he had received sixty sovereigns stolen by

another, knowing the same to have been stolen, and the prosecutor, in order to sustain that substantive charge, offered to prove that the person alleged to have stolen the money had confessed her guilt before a magistrate. She had never been convicted and was not included in the indictment against the prisoner, and the revisory court held that the evidence of the confession under those circumstances was not admissible in evidence, which is all that was involved or decided in that case. Whether the decision was right or wrong, it is quite clear that it does not touch the question presented in the case before the court for several good and sufficient reasons: 1. The indictment was against the receiver of stolen goods for the substantive offence as authorized by statute; 2. The principal had never been convicted, and was not joined in the indictment; 3. Neither the conviction of the principal nor her guilt being formally set forth in the indictment, it might well have been held that there was no proper foundation laid to admit such proof. Unless the decision can be viewed in that light, the proper answer to be made to it is that it is not good law as understood in the Federal courts. If viewed as deciding that the confessions of the principal in a case where the principal and accessory are indicted and tried together are not admissible to prove the guilt of the principal, it is clearly opposed to the general course of decisions in criminal cases for centuries, and it is difficult to see why any different rule should prevail where the principal is first convicted, provided they are both joined in the same indictment.

Many cases arise where criminal justice cannot be administered if the rule is as is supposed by the defendants. Take, for example, the case of an accessory in murder where the principal is not upon trial because he pleaded guilty in the presence of the court and jury. Conviction of the accessory cannot take place without first proving the guilt of the principal, and his guilt cannot be shown without proving that he committed the homicide with malice aforethought. Previous threats are the more usual evidence of malice in trials for murder, but if those are inadmissible, then the accessory must be acquitted, however flagrant his guilt. Precisely such a case occurred

before Mr. Justice Erle, sitting at Lent assizes, in the western circuit in 1846, and he held that the statements of the principal tending to show that he inflicted the mortal wound with malice aforethought were admissible, although the principal was not on trial. Objection was made by the defendant, but the court ruled that the evidence was admissible. *Regina v. Pym*, 1 Cox, Cr. Cas. 340.

Malice aforethought is the characteristic criterion by which murder is distinguished from manslaughter, and many cases of secret homicide arise where there is no proof of antecedent threats or of lying in wait, and in such cases resort is necessarily had to circumstances, and frequently to the subsequent conduct and declarations of the prisoner, to prove that material and characteristic allegation of the indictment. Such evidence is clearly admissible against the principal when he is on trial, and if it is not admissible in the trial of the accessory to confirm the *prima facie* presumption resulting from the record of the principal's conviction in a case like the present, then there can be no such confirmation, which cannot be admitted.

Recent acts of Parliament provide to the effect that an accessory after the fact, indicted in the ordinary way with the principal felon, may be tried before the principal; and the same learned judge in the case of *Regina v. Hansell*, 3 Cox, Cr. Cas. 598, also held, where an accessory after the fact to a charge of sending threatening letters was tried in the absence of the principal, that the letters so written and sent by the principal were admissible to prove the guilt of the principal. Suggestion may be made that the judge in both of those cases, when referred to the case of *Rex v. Turner*, admitted that the confessions of the principal would not be admissible, and the defendants are certainly entitled to the benefit of that concession. But we cannot concur in it, and are strongly inclined to think that it was only made in deference to a decision which it was not competent for a judge sitting at *nisi prius* to overrule. Confessions of the principal are certainly admissible to prove his own guilt when the accessory is tried with him, and, if so, it cannot be admitted that the principal can acquit the accessory in cases

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where there is no other sufficient evidence to prove his own guilt than his confessions by pleading guilty and retiring from the bar under his recognizance. Such a rule seems to be absurd, as it would necessarily lead to absurd results. Statements of the principal in the case of *Regina v. Pym* were admitted to prove that he acted from malice, because the allegation of malice was not an element in the offence charged against the accessory, and because it was allowable to prove the guilt of the principal by any testimony which would be admissible if both were on trial together. *Ratcliffe's case*, 1 Lewin, Cr. Cas. 121. Malice, it is said, in such a case is only a preliminary fact to be proved as the foundation to let in the evidence to prove the guilt of the accessory. We agree to that proposition, and hold that all the allegations in the indictment setting forth the guilt of the principal or his conviction, as the case may be, are to be viewed in the same light. When the principal and accessory are joined in the same indictment, it is always necessary to allege the guilt of the principal, as the joinder of the principal presupposes that he has not been previously convicted; but the regular mode of indicting the accessory, if the principal has been separately indicted and convicted, is to set out the record of the principal's conviction, unless the accessory is indicted for a substantive offence in pursuance of some statutory regulation. Where the principal felon has been convicted, it is sufficient in the indictment to state the conviction without stating the sentence, and it is never necessary to enter into the details of the evidence to prove the guilt of the principal, as the record of the conviction proves itself and affords *prima facie* evidence of the guilt of the principal felon. Ros. Cr. Ev. 870; *Hyman's case*, 2 Leach, C. C. 925; 2 East, P. C. 782; *Baldwin's case*, 3 Camp. 265; Foster, Cr. L. 365; 1 Chitt. Cr. L. 273.

Perfect security will be afforded to the innocent if these rules are properly applied, as the presumption as to the guilt of the principal is not a conclusive one, but it is always competent for the accessory to show that the principal was improperly convicted. 1 Arch. Cr. P. & P. (ed. 1860) 83; *Rex v. McDaniel et al.*, 19 St. Tri. 806; 1 Gabbet, C. L. 36; 4 Bl. Com. 324.



Special attention is called by the defendants to several decisions of the State Courts supposed to affirm the rule for which they contend; but it will not be necessary to examine any one of them, except the case of *Com. v. Elisha*, 3 Gray, 460, as the others are founded upon the case of *Rex v. Turner*, which has already been examined. Concisely stated, that case shows that the defendant was indicted as the receiver of stolen goods, but that it was not alleged in the indictment that the principals had been convicted. Indicted in that form the defendant pleaded not guilty, and the prosecutor offered in evidence the record of the prior conviction of the principals on an indictment against them in which the defendant on trial was not joined, and the Supreme Court of this State held that the record was not admissible, because the conviction was *res inter alios acta*, and this court entertains no doubt that the decision was correct, because the indictment against the receiver was for the substantive offence under the statute of the State, and did not formally allege either the guilt of the principals or that they had been previously convicted. Evidence of the confessions of the principal cannot be admitted to prove his guilt in an indictment against an accessory, except when the guilt of the principal or his antecedent conviction is alleged in the indictment. Doubts have been expressed whether the evidence is admissible except when the guilt of the principal is alleged, but there is no foundation for the doubt, as the record of the conviction is only *prima facie* evidence for the government and is always open to opposing evidence, to be offered by the accessory. Tested by these principles, it is clear that the decision was correct, and that it is perfectly consistent with the rule laid down in *Com. v. Knapp*, 10 Pick. 484, that the verdict against the principal in the trial of the accessory is to be taken as *prima facie* evidence of the principal's guilt.

Suppose, however, that the confessions of the principal were improperly admitted, still the motion for new trial ought not to be granted for the cause under consideration, because the record of the conviction of the principal was properly introduced and was *prima facie* evidence of his guilt in the trial of the other

defendants, and, inasmuch as there was no opposing testimony on that point offered by the present defendants, it was sufficient evidence to warrant the finding of the jury. No opposing testimony on that point was offered during the trial. On the contrary, the guilt of the principal was admitted in the opening of the defence and throughout the trial, and the defence proceeded from the opening to the close upon the ground that the crime was committed by the principal and the other member of the firm named in the indictment, and that the transactions were kept secret from the two defendants before the court. Objection may be made by the defendants that the court did not so instruct the jury, but that is no answer to the proposition, as the motion for new trial is addressed to the discretion of the Court, and will never be granted when the court sees that the verdict is clearly and unmistakably right.

Injustice, it is suggested, may be done to the accessory by admitting the confessions of the principal, as the confessions may have been improperly obtained; but the answer to that suggestion is, that the plea of not guilty, pleaded by the accessory, always puts in issue the charge against the principal as well as that against himself, and, whether tried at the same time with the principal or subsequently, he may controvert the guilt of the principal as fully as the principal himself may do, even when the latter is separately indicted and tried by a separate jury. Where the principal has been convicted before the accessory is indicted, the indictment against the accessory alleges not the guilt but the antecedent conviction of the principal, so that it is quite clear that, if the record of the conviction is not admissible to prove that allegation, the accessory in all such cases must be acquitted. Such a rule cannot be admitted, and must be classed with the one before considered, which would allow the principal to be found guilty as against himself and not guilty as against the accessory when both are tried at the same time.

Certain other objections were taken to the rulings of the court in admitting testimony, chiefly upon the ground that the evidence admitted was irrelevant and immaterial, but the exceptions are not of character to require any extended examination. Much of

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the testimony in the case was of a circumstantial character, and the rule is, that, whenever the necessity arises for a resort to such evidence, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. *Castle et al. v. Bullard*, 23 How. 187. Aided by the arguments at the bar, we have re-examined the several rulings, and are satisfied that they were correct. Convinced that the verdict was warranted by the evidence, we do not think it necessary to enter into any argument to justify our conclusion, as we are not able to see any substantial ground for a different opinion.

Motion for new trial overruled.

Judge LOWELL fully concurs in the order overruling the motion for new trial, but, in respect to the first cause assigned in the motion, he rests his decision upon the ground that the record of the conviction of the principal, as exhibited in the minutes of the clerk, was admissible, and was *prima facie* evidence of the guilt of the principal, and, in the absence of any opposing testimony, warranted the finding of the jury.



EBEN D. JORDAN, in Equity, v. THE AGAWAM WOOLLEN COMPANY.

BEFORE CLIFFORD AND LOWELL, JJ.

The expense of printing the record and evidence in an equity suit is, under the second additional rule of May 25, 1842, part of the costs, and properly taxable as such.

*John D. Bell*, for complainant.

*J. B. Robb*, for respondents.

CLIFFORD, J. Appeal to the court by the respondents from the taxation of costs in this case as made by the clerk. When made the appeal embraced two charges in the taxation, but, the objection to one of the charges being withdrawn, it is only necessary to inquire and determine whether the charge of three thou-

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sand one hundred and thirty-four dollars and fifty-one cents for printing the record preparatory to the final hearing is a proper charge in the taxation of costs in this suit against the respondents as the losing party. No objection is made to the amount if the complainant, as the prevailing party in an equity suit, is entitled by law to tax such expenses as costs in the suit, but the respondents contend that no part of the charge is warranted by law. Objection could not well be made to the amount, as it is conceded that it is no more than a fair remuneration for the printing of such matter, and the proof is that it does not much exceed what it would have cost to have procured the necessary number of written copies for the hearing, as appears by the report of the clerk. Respondents' objections are to the entire charge, and they frankly avow that they have taken the appeal in order to have the question settled by the court, whether anything can be taxed as costs in an equity suit, except what is specified in the fee bill prescribed in the act of Congress upon that subject. 10 Stat. at Large, 161. They maintain that nothing can be taxed as costs, either in a suit at law or equity, except what is specifically authorized in that act; but the court is of a different opinion for several reasons.

Costs are recognized as taxable in favor of the prevailing party, in several sections of the Judiciary Act, but that act contains no fee bill, and affords no means of ascertaining or determining what may properly be included in this taxation. Writs and other processes are also recognized therein as essential in judicial proceedings, but the act does not prescribe forms for any such purposes, or refer to any source from which they may be derived. 1 Stat. at Large, 84, 87. Left without other provision than that provided in the Judiciary Act, it is quite clear that the judicial system as organized by that act could not have been administered unless the courts had assumed the responsibility of supplying the deficiencies under the authority conferred by the seventieth section of the act, to make and establish all necessary rules for the orderly conducting of business in the said courts. Ibid. 83. Such a resort did not to any considerable extent become necessary, as Congress five days later passed the act entitled "An Act to regulate

Processes in the Courts of the United States.” Ibid. 93. Rates of fees, as well as the forms of writs and executions, and the modes of process in the Circuit and District Courts, were prescribed by the second section of that act, and the provision was that they should “be the same in each State respectively as are now used or allowed in the Supreme Courts of the same.” Fees for the travel and attendance of the prevailing party have always been taxed in the Federal courts for the district under that provision, because such fees were the proper subject of taxation at the date of the passage of that act in the Supreme Court of the State.

Reasonable compensation also has been constantly allowed, as occasion required, in those courts for the services of auditors, referees, masters, and assessors, upon the same principle and without hesitation or objection. Proper allowance was also made for the copies of records and other necessary documents, and for the abstracts of the proofs and exhibits in equity suits even before the adoption of any rule in that behalf by the Supreme Court. Jurisdiction in equity in the State courts of this district was much less comprehensive at that date than under existing laws, but it is believed that the practice as here described was well known and understood in those courts as authorizing a reasonable taxation for copies, and the abstracts of the proofs and exhibits of the record. Written copies of records and abstracts of equity cases were formerly used in the Supreme Court, but the power of the court to require them to be printed was never doubted as derived under the seventeenth section of the Judiciary Act. Circuit Courts possess the same power, as the words of the section are, “that all the said courts of the United States” may “make and establish all necessary rules for the orderly conducting business in said courts.” Suggestion may be made that the Process Act referred to was a temporary act, but it was continued by subsequent acts, and made permanent by the act of the 8th of May, 1792, subject to certain important alterations in respect to the forms and modes of proceeding in suits in equity, and in those of admiralty and maritime jurisdiction. 1 Stat. at Large, 123. Ibid. 191. Ibid. 276. By the original Process Act the rates of fees in causes

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of equity and of admiralty and maritime jurisdiction were prescribed to be "the same as are or were last allowed in the States respectively in the court exercising supreme jurisdiction in such causes." Ibid. 94. No change was made in respect to the rates of fees taxable between party and party in such causes by the subsequent act, whereby the original Process Act was made permanent. Express provision is made, in the third section of the last-named act, for the fees and compensations of marshals, clerks, jurors, witnesses, and district attorneys, but no provision whatever is made regulating the fees for the travel and attendance of the party, for the services of an auditor, referee, master, or assessor, or for any taxation for copies of the case in a writ of error, appeal in equity or in admiralty, or for the abstracts of the proofs and exhibits in a final hearing in equity. Other statutory regulations upon the subject of fees were passed by Congress prior to the act of the 26th of February, 1853, but none of them touch the matters herein enumerated as prescribed in the act making permanent the original Process Act. 1 Stat. at Large, 624. Nothing of the kind is pretended by the respondents, but they insist that every charge not expressly authorized by the act of the 26th of February, 1853, must be regarded as unwarranted, and to support that proposition they rely upon the language of the first section of the act.

Provision is there made to the effect "that in lieu of the compensation now allowed by law" to attorneys, solicitors, proctors, district-attorneys, clerks, marshals, witnesses, jurors, commissioners, and printers, "the following and no other compensation shall be taxed and allowed." Repeated decisions have established the rule that the fees and compensations enumerated in the act are exclusive of all others, and that none other as respects the officers and persons therein described can be taxed and allowed; but it is clear that neither the provisions in the act of Congress nor the decisions of the courts have any respect to any matters not enumerated in the act. They do not touch the question whether the prevailing party is entitled to costs for his travel and attendance, nor whether an auditor, referee, master, or assessor is entitled to a reasonable compensation for his ser-

vices, nor whether it is competent for the court by rule to require that the record in a writ of error or appeal shall be printed before trial, or to require that the record or an abstract of the proofs and exhibits in an equity suit shall be printed before the final hearing. Untouched as these matters are in the subsequent legislation of Congress, the absence of any rule of court would be still regulated by the provision in the original Process Act, that the rates of fees in causes of equity shall be the same as are and were last allowed by the States respectively in the exercise of supreme jurisdiction in such causes. Power was conferred upon the Supreme Court by the sixth section of the act of the 23d of August, 1842, "to regulate the whole practice of the" District and Circuit Courts, and by the seventh section of the same act to make and prescribe regulations to the said courts as to the taxation and payment of costs on all suits and proceedings therein. By that section the Supreme Court might also "make and prescribe a table of the various items of costs which shall be taxable and allowed in all suits *to the parties*, their attorneys, solicitors, and proctors, to the clerks of the court, to the marshal of the district and his deputies, and other officers serving process to witness, *and to all other persons whose services are usually taxable in bills of costs.*" Stat. at Large, 578. Doubtless the power therein conferred so far as respects attorneys, solicitors, proctors, clerks, and marshals, and their deputies, and all other officers and persons named in the subsequent fee-bill act is repealed; but it is a great mistake to suppose that no costs of any kind can be allowed except what are enumerated in that fee-bill. Justice could not well be administered if that was the rule; and there is nothing in any act of Congress to support the proposition. *Hathaway v. Roach*, 2 Wood & M. 63; *Prouty v. Draper*, 2 Story C. C. 199. Costs in equity suits are regulated by the twenty-fifth equity rule, and also by the sixty-second rule, which provides that the same solicitor, in cases where there are two or more defendants and they file separate answers, shall not be allowed cost for more than one answer, unless a master upon reference shall certify that separate answers were necessary. Rule 82 provides that the compensa-



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tion to be allowed to every master in chancery for his services in any particular case shall be fixed by the Circuit Court in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. Both judges concurring, the Circuit Courts may make other and further rules and regulations for the practice, proceedings, etc. in their respective districts not inconsistent with the rules prescribed by the Supreme Court. Rule 89. Pursuant to that authority, the judges of the Circuit Court for this district, on the 25th of May, 1842, adopted the second additional rule, which, among other things, provides that in all causes in equity set down for a hearing, a printed copy of the whole record shall be delivered to each of the judges of the court at least seven days before the day of the hearing, . . . . "and that the costs of the printing are to be deemed costs in the cause." Prior to that date the parties had been required to furnish to each of the judges before the final hearing of the cause full "abstracts of the bill answers, — evidence in documents in the cause"; but since the adoption of that practice has been uniform to require the whole record to be printed. No doubt is entertained by the court of the legality of the rule, and, its utility having been proved by an experience of more than a quarter of a century, the court is not inclined to repeal it or to adopt any other in its place. The taxation of the clerk is sustained.



WILLIAM P. WILLIAMS v. NEW ENGLAND MUTUAL MARINE INSURANCE COMPANY.

BEFORE CLIFFORD AND LOWELL, JJ.

The defendant insured a vessel lost or not lost for the term of one year, taking the risk at sea, and in port, in dock, and on ways, with permission to sail with or without pilots, and to tow and assist vessels in all situations. Liability not to attach for any breakage of machinery or bursting of boiler unless caused by stranding or collision. The underwriters were to be liable if the vessel should take fire, and any part of the machinery or

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boilers was thereby damaged. When insured, the vessel was laid up. After insurance she was chartered to the United States government to be used as a government transport, but not to go to any place where there was not sufficient depth of water for her to go in safety. She was sent by a military officer of the United States to Hatteras Inlet. When starting for that place her destination was not known to her owner, but was to the charterers and their agents, as was also the fact that she was to cross the bar at the Inlet. She proceeded to her destination, and remained outside the bar until ordered from a government tug to follow the tug over the bar. In following the order she struck on the bar, was driven among breakers and became a complete wreck. The order to cross the bar was from the military commander of the expedition acting under the authority of the government of the United States. The draught of the vessel and the depth of water on the bar were known to the master of the tug. The water was so shoal that a vessel of the size, draught, and build of the insured one could not reasonably be expected to cross in safety, and such striking would naturally result in her loss. There was a strong wind and a high sea. The attempt to cross the bar was rash, hazardous, and unjustifiable. *Held*, the orders of the general commanding must be considered as if given by the President. But the United States were the charterers, and must be regarded as the agents of the owners, and the question was the same as if the owners themselves had given the order to cross the bar, instead of a military commander in the United States army, and the same consequences ensued, and that the plaintiff could not recover.

Insurance money may be recovered where losses were remotely occasioned by the negligence or misconduct of the master of the vessel, if proximately caused by the perils insured against.

But the insured cannot recover for a loss occasioned by his own wrongful act, or by that of any agent for whose conduct he is responsible.

AGREED statement. Assumpsit upon a marine policy of insurance. The principal question was, whether the circumstances attending the loss were such that the plaintiff, within the true intent and meaning of the policy, was entitled to recover. Briefly stated, the material facts were: that the plaintiff was owner of the steamship *New York*, her furniture, engine, machinery, and boiler; and that the corporation defendants on May 4, 1861, insured the same, lost or not lost, in the sum of \$6,500 for the term of one year from that date; taking the risk at sea and in port, in dock and on ways, with permission to sail with or without pilots, and to tow and assist vessels in all situations. . . . Liability not to attach "for any derangement or breakage of machinery or bursting of boilers unless occasioned by stranding or collision with another vessel." The company was to be liable if the vessel should take fire, and any part of the machinery, or the boilers, should thereby be damaged. The value of the steamship and her furniture expressed

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in the policy was \$18,000, and the sum insured on the same was \$3,900. The policy value of the engine, machinery, and boilers was \$12,000, and the sum insured on the same was \$2,600, at a premium of twelve per cent. Two other policies of like date, tenor, and effect were also obtained by the plaintiff in two other companies upon the same steamship and her furniture, and also on her engines, machinery, and boilers, amounting in all to the sum of \$9,500, in addition to the amount involved in this suit. The agreed statement showed that the same valuation was affixed to the objects insured in those policies as is expressed in the policy in this case. The amount insured in this policy was made payable in case of loss to a third party, but as the claim of that party was paid before the loss, no further reference to that circumstance is necessary. Prior to November 1, 1861, the steamship had always been employed in the merchant service, but at the date of the policy she was laid up in the harbor of Boston, without employment. On November 1, 1861, she was chartered by her owner for the period of fifteen days to the United States government, by a charter-party of that date, "to be used as a government transport, and to leave New York under sealed instructions, to be opened when one hundred miles south of that port," and to be governed in her future course by such instructions, but not to be compelled to visit any port or place at which there was not sufficient depth of water for her to go in safety. Subsequent to the expiration of that charter-party, to wit, on December 27th, in the same year, the owner of the steamship, in consideration of \$300 per day, during the term of the contract, and until she should be returned to her owner at that port, chartered her to the transport agent of the War Department for the full term of ten days from the date of the charter, and as much longer as she should be required by the War Department, subject to all the conditions specified in the antecedent charter to the United States government. Under the last-named charter-party the steamship was immediately taken into the possession and control of the United States, and was sent to a dock in that port for repairs. When repaired she was loaded by the charterers with ordnance stores, and on January 7th following

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she sailed under orders communicated to her master to proceed to Fortress Monroe for further orders from the government. Pursuant to those orders, she proceeded to the anchorage off that Fortress, and there the master, on January 7th, received sealed orders from General A. E. Burnside, subsequently opened at sea, "to proceed directly to Hatteras Inlet, hoist your signal for a pilot, and after crossing the bar, anchor as far on one side of the channel as you can with safety." In obedience to that order the steamship at 12 M., on January 13th, came to anchor in safety off Hatteras Inlet, and set her signal for a pilot. Remark should be made that when she sailed for Fortress Monroe her ultimate destination was not known to her owner, but the charterers and their agents who had charge of her, and of her loading, knew that she was destined to proceed to Hatteras Inlet and across the bar there for the purpose of transporting ordnance stores for the troops of the United States as one of the fleet of the Burnside Expedition. The agreed statement also showed that the steam-tug *Ceres*, then in the employment of the government as a pilot for that expedition, came out at three o'clock in the afternoon of that day and gave orders to the steamship to follow her over the bar, and it was agreed that in attempting to do so, and when she was directly in the wake of the pilot-boat, and within a ship's length of her, she struck upon the bar, where she remained fast, but before the following morning she was driven upon the breakers, and during the next day and night became, by force of the wind and waves, a complete wreck, and was totally lost and destroyed.

*C. T. and T. H. Russell*, for plaintiff.

*W. G. Russell*, for defendants.

CLIFFORD, J. Three principal defences are set up by the defendants to the claim of the plaintiff, but they will be considered in the reverse order from that in which they were presented at the argument. They contend that the plaintiff cannot recover, for the following reasons: —

1. Because the ship was lost, not by perils insured against, but by the wrongful act of the insured, or his agents.
2. Because the employment of the steamship in the military

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service was such a change of the risk contemplated by the parties, as to discharge the underwriters from their liability.

3. Because the steamship, when she sailed, was unseaworthy for the intended voyage and was lost by reason of such unseaworthiness.

Marine insurance is a contract whereby one party for a stipulated sum undertakes to indemnify the other for loss arising from certain perils or sea-risks to which ship-merchandise or other interest may be exposed, during a certain voyage or for a certain period of time. Seaworthiness of the ship for the voyage when she sails is a condition precedent to the liability of the underwriter for any loss incurred in the course of the voyage. Repairs may be made while the vessel is in port and during the lading of the cargo, as it would occasion much delay and unnecessary expense to require that she should be completely repaired before she can take on board any part of her cargo, and such a rule, if adopted, would be of no benefit to the insurers, provided the vessel is made seaworthy before she sails. *Merchants Ins. Co. v. Clapp*, 11 Pick. 56. The meaning of that requirement is, that the vessel shall be staunch and strong, that she shall be suitably furnished, and that she be provided with a competent master and with a crew adequate in number and with sufficient experience for the voyage. *Propeller Niagara v. Cordes et al.*, 21 How, 23. Provided the ship is seaworthy and properly commanded, equipped, and manned when she sailed, as the contract requires, the insurers are liable for any loss proximately caused by the perils insured against, although they have been remotely occasioned by the negligence or misconduct, not amounting to barratry, of the master or crew, whether such negligence or misconduct consisted in omitting some act which ought to be done, or in doing some act which ought not to be done, in the course of the navigation. *Redman v. Wilson*, 14 Me. & Wils. 476; *Patapsco Co. v. Coulter*, 3 Pet. 236; *Col. Ins. Co. v. Lawrence*, 10 Pet. 517; *Waters v. Merchants Ins. Co.*, 11 Pet. 218; 2 Arn. Ins. 770; 1 Phillips Ins. § 1051.

Underwriters are held to be liable under such circumstances, by the very terms of the policy, as they take upon themselves all

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losses by the perils therein enumerated without any reference to the fact whether they are attributable to the negligence or default of the master or crew, or to mere accident or irresistible force. Doubtless such an exception might be made, but the law will not make it, where there are no words in the policy to signify that such was the intention of the parties, as the owner is not in general in any better condition to guard against a loss by such means than the insurers. *Hale v. Wash. Ins. Co.*, 2 Story C. C. 176; *Copeland v. N. E. Ins. Co.*, 2 Met. 432. But the insurers are not liable for a loss even by the perils enumerated in the policy, if it was occasioned by the wrongful act of the insured or his agents, for whose conduct he was directly responsible. 1 Phillips Ins. 1046.

Authorities to prove that persons insured cannot recover for a loss occasioned by their own wrongful acts are hardly necessary, as the proposition involves an elementary principle of universal application. Losses may be recovered by the insured, though remotely occasioned by the negligence or misconduct of the master or crew, if proximately caused by the perils insured against, because such mistakes and negligence are incident to navigation and constitute a part of the perils which those who engage in such adventures are obliged to incur, but it was never supposed that the insured could recover indemnity for a loss occasioned by his own wrongful act or by that of any agent for whose conduct he was responsible. *Thompson v. Hopper*, 1 Ell. & Bl. 944; Marsh on Ins. 376; *American Ins. Co. v. Ogden*, 20 Wen. 305; *Bell et al. v. Carstairs*, 14 East. 374; *Cleveland et al. v. Union Ins. Co.*, 8 Mass. 308.

Attention will next be called to certain other material facts of the case, as agreed by the parties. They agree that the order from the steam-tug to the steamship to cross the bar was given by direct authority from the commander of the expedition, and that the draught of the steamship was known to the master of the tug who gave the order, and that the draught of water upon that bar was a well-known and notorious fact; that the shoalness of the water there is such that a steamship of the draught of the steamship in question could not reasonably be expected at any

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stage of the tide to cross that bar in safety ; that a vessel of the draught and build of the steamship was an unfit vessel for a voyage across that bar, because she would, under the most favorable circumstances, strike upon the bar, and, unless taken in a tow by a steamer of lighter draught, such striking would naturally if not inevitably result in her loss ; that there was a strong wind and a high sea at the time the attempt to cross the bar was made, increasing both the ordinary liability to strike and the danger resulting from it ; and they also agree that taking into consideration the state of the tide, sea, and wind at the time, the attempt to cross the bar was an unjustifiable, rash, and hazardous act of navigation which no prudent or skilful navigator would have undertaken ; that the master would not have made the attempt except from the compulsory order from the steam-tug, but would have remained at anchor in safety where he was when he received the order off Hatteras Inlet. Apart from the other defences, it is quite clear that the facts set forth in the agreed statement applicable to the proposition under consideration show that plaintiff cannot recover.

Obedience to the order from the steam-tug could not be refused, as it emanated from the general commanding the military expedition, who beyond question represented the United States. Orders given by a commanding general under those circumstances must be regarded as of the same effect as if given by the President, as they were not countermanded and have never been disavowed. *The Venice*, 2 Wall. 276. Beyond question the United States were the charterers of the steamship, and as between these parties they must be regarded as the agents of the owners of the steamship. Viewed in that light, the question is, whether the owners, if they had given the order to cross the bar when it was given by the steam-tug, and the steamship had been lost, would have been entitled to recover.



## EDWARD K. BUTLER v. THOMAS RUSSEL.

## BEFORE CLIFFORD AND LOWELL, JJ.

The repeal of the paragraph in § 5 of the act of June 30, 1864, imposing a duty of ten *per centum ad valorem*, on lastings, mohair-cloth, etc., did not revive or leave in operation the corresponding provision, expressed in the same words, in § 6 of the act of July 14, 1862.

In the exposition of statutes the court aims to learn the intention of the legislature.

If there are several statutes relating to the same subject, they are to be taken together and compared, as parts of one system.

When accurately ascertained, the real intent of the legislature should always prevail, even over the literal sense of the terms employed, and to the exclusion of other rules devised by courts to aid in the accomplishment of that object.

Repeals by implication of revenue and collection laws are not favored.

In order to work a repeal by implication there must be a positive repugnancy between the provisions of the new and old law.

Where the provisions of the old statute are revised in the later enactment, and where the later statute was intended to prescribe the only rules upon the subject, the subsequent is held to repeal the former statute.

When a revising statute covers the whole subject-matter of antecedent statutes it virtually repeals the former enactments, without any express provision to that effect.

Where some parts of the revised statute are omitted in the new law, they are not, in general, to be regarded as left in operation if it clearly appear to have been the intention of the legislature to cover the whole subject by the revision.

The general rule is that a repeal of the repealing statute revives the original act.

It could not be supposed that Congress would repeal the provision of the act of 1864, if they had supposed or intended that thereby the same provision in the act of 1862 would have been revived.

It is the better opinion that by the repeal of the provision of § 5 of the act of 1864, the manufactures in question became dutiable under the preceding paragraph in the same section which provides that there shall be "levied and collected on bunting and all other manufactures of worsted," etc., not otherwise provided for, a duty of fifty *per centum ad valorem*.

ASSUMPSIT brought by the plaintiff, as an importing merchant, against the defendant, as collector of the port of Boston, to recover back import duties, alleged to have been illegally exacted and paid under written protest. All the counts in the declaration, except the fourth one, were withdrawn, and to that the defendant demurred. Briefly stated, the material facts, as alleged in the fourth count, were, that the plaintiff, on the 4th of March, 1867, imported into said port three cases of manufactured cloth, not combined with india-rubber, and composed in

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part of worsted, woven and made in patterns of such size, shape, and form, and cut in such manner, as to be fit exclusively for slippers, and for no other purpose; and the plaintiff alleged that said three cases of manufactured cloth so woven, made, and cut, were then and there subject to a duty of ten *per centum ad valorem*, and no more, and that the goods so imported were then and there of a dutiable value "of above eighty cents per pound," to wit, of the dutiable value of \$1,217, and were then and there subject by law to a duty as aforesaid of \$121.70, and he charged that the defendant, as such collector, wrongfully imposed on said goods a duty of fifty cents per pound, and thirty-five *per centum ad valorem*, amounting in the aggregate to \$749.45, and that he, the plaintiff, paid the excess beyond the legal duties, under protest, to obtain the goods. By the sixth section of the act of July 14, 1862, goods imported from foreign countries, and therein enumerated, are subject to a duty of ten *per centum ad valorem*. 12 Stat. at Large, 549. Lastings, mohair-cloth, silk, twist, or other manufacture of cloth, or made in patterns of such shape and form, or cut in such manner, as to be fit for shoes, slippers, boots, bootees, gaiters, and buttons exclusively, not combined with india-rubber, are enumerated in that section, and the theory of the plaintiff was, that the three cases of manufactured cloth, which were imported as described in the fourth count of the declaration, were dutiable under that provision. 12 Stat. at Large, 550. The defendant insisted that the goods as imported were dutiable under the third paragraph of the second section of the act of March 2, 1867, which provides, among other things, that there shall be "levied, collected, and paid, . . . on all manufactures of every description, composed wholly or in part of worsted, the hair of the alpaca goat, or other like animals, except those which are composed in part of wool, not otherwise provided for, . . . valued at above eighty cents per pound, fifty cents per pound, and in addition thereto, . . . thirty-five *per centum ad valorem*." 14 Stat. at Large, 561.

*T. K. Lothrop*, for plaintiff.

*W. A. Field*, Assistant U. S. District Attorney, for defendant.

CLIFFORD, J. Difficulties of so serious a character attend the

solution of the question, that it will not be possible to determine it in a satisfactory manner without a careful review of the different provisions upon the subject, in most or all of the recent acts of Congress, regulating the levying and collection of import duties. Manufactures of goat's-hair or mohair, or of which goat's-hair or mohair was a component material, not otherwise provided for, were, by § 22 of the act of March 2, 1861, subjected to a duty of thirty *per centum*. 12 Stat. at Large, 192. But § 23 of the same act included lastings, mohair-cloth, silk, twist, or other manufactures of cloth, cut in strips of patterns, of the size and shape for shoes, slippers, boots, bootees, gaiters, and buttons exclusively, if not combined with india-rubber, in the list of articles declared by that section to be exempt from duty. 12 Stat. at Large, 195. Such was the state of congressional legislation upon the subject when the act of July 14, 1862, was passed, on which the plaintiff relies to sustain his claim.

Cloth woven, as well as cloth in patterns or cut in such a manner as to be fit exclusively for the described purposes and no other, is included in that provision, but the duty thereby imposed corresponds in amount with the theory of the plaintiff. Comment upon those provisions is at present unnecessary, except to remark that § 9 of the same act, which is entitled "An Act increasing temporarily the Duties on Imports, and for other Purposes," imposes a duty on all manufactures of worsted, or of which worsted is a component part, not otherwise provided for, of five *per centum ad valorem*, and also a similar duty on manufactures of goat's-hair or mohair, or of which goat's-hair or mohair is a component part, with the same qualification as that in respect to worsted goods. 12 Stat. at Large, 553, 557. Duties on imports remained from the date of that act, without any material permanent alteration, to June 10, 1864, when the act entitled "An Act to increase Duties on Imports, and for other Purposes" was passed. 13 Stat. at Large, 202. § 5 of that act provides that there shall be "levied and collected and paid . . . on bunting and on all manufactures of worsted, mohair, alpaca, or goat's-hair, or of which worsted, mohair, alpaca, or goat's-hair was a component material, not otherwise provided for, fifty *per*

*centum ad valorem*; but lastings, mohair-cloth, silk, twist, or other manufactures of cloth, woven or made, in patterns of such size, shape, and form, or cut in such manner as to be fit exclusively for shoes, slippers, boots, bootees, gaiters, and buttons, when not combined with india-rubber, are provided for in that act, in the next succeeding paragraph of the same section, and the provision is that those articles shall be subject to a duty of ten *per centum ad valorem*. Compare the language of that paragraph with that employed in the corresponding provision in the seventh section of the act of July 14, 1862, and it will be seen that the provisions are alike without the variation of a word.

All acts and parts of acts repugnant to the provisions of the act of June 13, 1864, are declared, by § 22 of the act, to be repealed except for the purpose of collecting the duties imposed by the act for the prosecution and punishment of offences, and for the recovery, collection, distribution, and remission of fines, penalties, and forfeitures. 13 Stat. at Large, 216. Rates of duty on these articles, as specifically enumerated, remained unchanged until the passage of the joint resolution of March 2, 1867, which repealed the paragraph in § 5 of the act of June 30, 1864, enumerating the articles, and imposing a duty of ten *per centum ad valorem* on the same; but the repealing resolution left the preceding paragraph in the same section in full force, in which it is provided that there shall be levied, collected, and paid on bunting, and all other manufactures of worsted, mohair, alpaca, or goat's-hair, or of which worsted, mohair, alpaca, or goat's-hair shall be a component material, not otherwise provided for, fifty *per centum ad valorem*. 13 Stat. at Large, 208; 14 Stat. at Large, 571. The argument for the plaintiff is, that the repeal of the paragraph in § 5 of the act of June 30, 1864, imposing a duty of ten *per centum ad valorem* on "lastings, mohair-cloth," etc., left in full operation or revived the corresponding provision in § 6 of the act of July 14, 1862, although the two provisions are expressed in exactly the same words. He attempts to maintain that theory upon two grounds, quite inconsistent with each other:—

Because both provisions were in operation from the date of the

second act, to the date of the joint resolution, and the proposition is, that the repeal of the last in date left the first untouched and in full force.

Because the repeal of the last provision, even if it operated while in force as a repeal of the first provision, revived the first, and made it operative anew, from the date of the repeal of the subsequent act. Enforced as these propositions were with much ingenuity, they have been examined with care, but the court is of the opinion that neither of them can be sustained, from several reasons which will presently be stated. In the exposition of statutes the established rule is, that the intention of the legislature is to be deduced from a view of the whole statute, and every part of the same, and where there are several statutes relating to the same subject, they are to be taken together, and compared in the construction of any material provision, because they are considered as having one object in view and as pertaining to one system. But when accurately ascertained the real intention of the legislature ought always to prevail, even over the literal sense of the terms employed, and to the exclusion of other rules devised by courts to aid in the accomplishment of that object. 1 Kent Com. (11th ed.) 462; Broom's Legal Max. 556; Sedg. on Stat. 231; Smith Com. 649.

Rules and maxims of interpretation are ordained as means of discovering the true intent and meaning of the lawgiver, but the primary rule is, that whenever the meaning which the makers of a statute entertained can be discovered by fit signs, it ought to be followed in its construction, in a course consonant to reason and discretion. Dwarris on Stat. (2d ed.) 557. Repeals by implication of revenue and collection laws are not favored, and the general rule is, that in order to work a repeal by implication, there must be a positive repugnancy between the provisions of the new law and the old; but well-founded exceptions exist to that general rule, as where the provisions of the old statute are revised in the later enactments, and where it appears that the later statute was intended to prescribe the only rules upon the subject. In such cases the subsequent statute is held to repeal the former one, although the provisions of the subsequent

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statute are not in all respects repugnant to those contained in the act of antecedent date. *Davis v. Fairbairn*, 3 How. 636; *Plank Road Co. v. Allen*, 16 Barb. 18; *Farr v. Bracket*, 30 V 346; *Woods v. United States*, 16 Pet. 342; *United States v. Walker*, 22 How. 229; *Bartlett v. King*, 12 Mass. 545; *Ellis Paige et al.*, 1 Pick. 45; *Pingrae v. Snell*, 42 Me. 55; *Bowen Lease*, 5 Hill. 225.

Articles of foreign merchandise, named in the act of June 8 1864, were subject to no other import duty than that described in that act, but the provision of § 22 of the act was that the duties upon goods imported from foreign countries, not provided for in that act, "shall be and remain as they were according to existing laws prior to April 29" of that year, showing conclusively that Congress intended thereby to make, and did make, a comprehensive revision of all the antecedent acts imposing import duties, and that the act, when passed, became the only law in force in regard to the rates of duties on the articles enumerated in the act. Evidence to support that conclusion is found in almost every section in the act, and the provision in § 22, already referred to, is by necessary implication equivalent to an express declaration to that effect.

Temporary increase of import duties, to the extent of fifty *per centum* on the rates previously authorized by law, was imposed on April 29 next preceding the passage of the law in question, by the joint resolution of that date; but the evident intention of Congress, in passing the act under consideration, was to effect a permanent increase of duties, which was accomplished in part by providing for higher rates, and in part by diminishing the free list and by changing the basis of computation in ascertaining the dutiable value of imported merchandise. By that act the dutiable value of imported goods was declared to be the actual value of the goods on shipboard at the last place of shipment, adding thereto every expense, from the place of growth, production, or manufacture, to the vessel in which the shipment was made, and including the value of the sack, box, or covering of any kind in which the goods were contained, together with the commission and all costs and charges specified by law. 13 Stat. at Large, 217

Changes were also made in the regulations for levying and collecting import duties, as well as in the basis for ascertaining the dutiable value of the importations. Examined in view of these suggestions, it is impossible to hold that these two provisions were both in force at the same time, and it is evident that the new act was intended as a complete revision of the old law, not only in regard to the rates of duty on the articles named in the act, but also in regard to the basis of computation in ascertaining the dutiable value of the goods and in many other respects.

When a revising statute covers the whole subject-matter of antecedent statutes, the revising statute virtually repeals the former enactments without any express provision to that effect, and even when some parts of the revised statute are omitted in the new law they are not in general to be regarded as left in operation, but are to be considered as annulled, if it appear plainly that the intention of the legislature was to cover the whole subject-matter by the revising statute. *Davies et al. v. Fairbairn*, 3 How. 636 ; *School Dist. v. Whitehead*, 2 Beasely, 290. None of these principles are controverted by the plaintiff, but he contends that the rule, as stated, has many exceptions, and that where one statute is enacted in the same words as a former one, without a repealing clause and without any change of provisions, it may well be maintained that one is no repeal of the other, and that both are in force ; but it is a sufficient answer to that proposition, as applied to this case, even if it be correct, to say that the repealing clause in the act in question, though special in form, virtually negatives that construction, and the many changes in the manner of levying and collecting the duties tend strongly in the same direction. Support, to a qualified extent, is certainly found to that proposition in the case *Com. v. Kimball*, 21 Pick. 377, but the remarks of the chief justice were not necessary to the decision of the case, and he well said that such a case would seldom happen, because a case could hardly be supposed in which the legislature would have a motive to pass a new law without some intent to change the existing law. Except for some special purpose, as therein suggested, doubts are entertained whether



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the rule is a sound one, but it is unnecessary to decide the point, as it clearly has no proper application to this case. *Foster v. Pritchard*, 40 Eng. L. & Eq. 446. Suppose both acts were not in force at the same time, then the plaintiff contends that Congress, in repealing the provision in the act of June 13, 1864, by the joint resolution, revived the similar provision in § 6 of the antecedent revised act, although the two provisions are expressed in the same words. Undoubtedly the general rule is, that by a repeal of a repealing statute, the original statute is revived, and it was held in the case of *Hastings v. Aiken*, 1 Gray, 163, that the general rule was so even where the original statute was repealed by implication; but the rule, like most other general rules, is subject to important qualification and exceptions. Much depends in all such cases upon the intention of the legislature, and it is equally well settled that the rule that a statute may be revived by implication or construction cannot operate upon any part of an act which has been expressly altered by subsequent legislation. Smith Com. 909; *Chancellor's Case*, 1 Bland, 663; *Wheeler v. Roberts*, 7 Cow. 536.

Neither want of knowledge, oversight, nor absurdity ought to be imputed to the legislature in the construction of a statute, unless the language employed in the provision to be construed, is such that the conclusion cannot be avoided without distorting its plain meaning. Nothing but forgetfulness or oversight could have induced Congress to repeal the provision described in the joint resolution if they had supposed that the effect of the repeal would have been to revive the provision in the former law, which was expressed in the exact same words. Such a conclusion would be unreasonable, as it supposes that Congress desired to render complex what was plain and unambiguous, which is past belief, if not positively absurd. Greater weight would be due to the suggestion, if the repeal under the opposite view would leave the manufactures in question exempt from duty, but the better opinion is that by the repeal they became dutiable under the preceding paragraph in the same section, which provides that there shall be levied, collected, and paid on "bunting and all other manufactures of worsted, mohair, alpaca,

or goat's-hair, or of which worsted, mohair, alpaca, or goat's-hair shall be a component material, not otherwise provided, fifty *per centum ad valorem*." Serious doubt cannot be entertained that the act, if the repealed paragraph had never been contained in it, would have been equally effectual, as a general revision of the tariff acts, in regard to the articles therein enumerated, to repeal the prior law; nor that the manufactures of cloth, woven or made in patterns, or cut in such a manner as to be solely fit "for shoes, etc.," would have been dutiable under the preceding paragraph, imposing a duty of fifty *per centum ad valorem* on the manufactures therein described and enumerated as fabrics in the piece or web, and it is not perceived that any different rule should be applied in the case before the court, where it appears that the second paragraph is repealed, as it leaves the act just as it would have been if it had never contained any such provision. Ten *per centum ad valorem* only was imposed by the second paragraph, referred to, on such manufactures of cloth, when woven, made, or cut in patterns as aforesaid, and the effect of the repeal, as intended by Congress, was to raise the duty from ten to fifty *per centum ad valorem*, as provided by the first paragraph upon the subject in § 5 of that act. 13 Stat. at Large, 208. Congress indubitably so understood the matter on March 29, 1867, when the joint resolution of that date was passed, which provides that the joint resolution of March 2 of that year already referred to, shall not be construed to apply to lasting, mohair-cloth, silk, twist, or other manufactures of cloth, woven or made in patterns of such size, shape, and form, or cut in such manner, as to be fit for buttons exclusively. Unquestionably the object of that resolution was to reduce the duties of the manufactures of cloth to ten *per centum ad valorem*, and Congress, in adopting that mode to accomplish the purpose, proceeded upon the ground that the rule under the antecedent law, as modified by the first-named joint resolution was fifty *per centum*, and not ten *per centum ad valorem*, as is supposed by the plaintiff. 13 Stat. at Large, 24.

Passed, as the second joint resolution was, subsequently to the approval of the tariff act of March 2, of that year, it became necessary, in order to prevent an increase of duty "on manufac-

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tures composed wholly or in part of worsted, the hair of the alpaca, goat, or other like animals," to take the same out of the operation of the third paragraph of § 2 of that act. 14 Stat. at Large, 561. When woven, made or cut for shoes, boots, bootees, or gaiters, Congress intended that the fabric should pay the same duty as if the fabric was imported in the piece or web, and for that reason the increased duty is levied upon the cloth as manufactured, without any designation of the purposes for which it was woven, made or cut, as provided in the third paragraph of § 2 of that act; but Congress did not intend to enact any increase of duty on that manufacture when woven, made, or cut, as aforesaid, exclusively for buttons, not made for tassels or ornaments, as provided in the eighth paragraph of the same section. 14 Stat. at Large, 561.

Such fabrics or manufactures are dutiable under the former act, and, since the passage of the joint resolution amending the repealing resolution, are subject only to a duty of ten *per centum ad valorem*, because they are regarded as embraced in the second paragraph upon that subject, in the fifth section of the prior act, just as if the repealing resolution had never passed, but the paragraph in all other respects remains repealed. Consequently the same fabric when woven, made, or cut, so as to be fit only for shoes, slippers, boots, bootees, or gaiters, or for anything else, except buttons, not for tassels or ornaments, if valued at above eighty cents per pound, is subject to a duty of fifty cents per pound, and in addition thereto is also subject to a duty of thirty-five *per centum ad valorem*.

Demurrer sustained. Fourth count adjudged bad. Judgment for the defendant.

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**UNITED STATES v. TWO HUNDRED AND SEVENTY-EIGHT BARRELS OF DISTILLED SPIRITS. JOSEPH A. BOYDEN and JOHN H. HARRINGTON, Claimants.**

Where goods are withdrawn from a United States bonded warehouse by fraud, the permit so obtained is a mere nullity, and the person perpetrating the fraud has no more right to the possession of the merchandise than if the same had been taken by force or had been stolen by him.

Goods removed from a United States bonded warehouse by consent of the collector obtained by fraud are subject to forfeiture.

Where a person purchases goods as agent for another, knowing that the same had been removed before the taxes were paid, from a United States bonded warehouse by fraud, the principal would be bound by the knowledge of the agent.

The jury must find in such case that the agent was cognizant of the fraud at the time he made the purchase, else they would not be justified in finding that the principal was affected by the antecedent knowledge of the agent.

The only office of a bill of exceptions is to bring before the appellate court such questions as were duly raised and properly saved in the subordinate court.

Where spirits fraudulently withdrawn from a bonded warehouse were seized for nonpayment of the taxes thereon, after they had been mixed at a rectifying establishment with others belonging to the claimants, so that they could not be distinguished, it was held that the United States were entitled to a forfeiture of a fair proportion of the mixture, even though the mixture might have been innocently made, provided the jury were satisfied from the evidence, and under the instructions of the court, that the spirits fraudulently withdrawn would have been by law liable to forfeiture, if they had not been so mingled with others.

The right of the United States to a forfeiture cannot be destroyed by the intermixture of the liquors fraudulently taken from the warehouse, with others not subject to forfeiture.

If spirits liable to forfeiture in consequence of fraudulent removal from a United States bonded warehouse and for nonpayment of taxes, were fraudulently mixed with others by the claimants and belonging to them, in order to destroy the identity of the goods so fraudulently removed, then the entire quantity is forfeited.

This rule is never applied where the goods can be separated and distinguished.

If the claimants knew, when they made the mixture, that the spirits which they mixed with their own had been fraudulently withdrawn from the bonded warehouse, then the spirits seized would be liable to forfeiture.

The rule might be otherwise where the effect of the intermixture was to convert the substances into a new species, unless the new species can be reduced to its elements.

Wherever goods of a similar kind are innocently intermixed, so that they cannot be distinguished, and they are not substantially destroyed, as by the production of a different species, the several owners may reclaim their respective shares, and take possession of the same wherever they can find them, if they can do so without a breach of the peace, or they may bring trover for the value of their proportions, against the person in possession, after demand and notice.

Under the act of July 13, 1866, where spirits on which taxes were imposed were found in the custody of the claimants, after fraudulent removal from the warehouse, with the

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taxes unpaid, it must be assumed, under a finding of the jury like the one in this case, that the claimants held them for the purpose of selling and removal in fraud of the revenue.

**ERROR** to the District Court of the United States for the District of Massachusetts. Certain distilled spirits, described in the information, were seized at Boston in this district, on April 27, 1867, and the original information was filed in the District Court on May 15 following. The cause of seizure, as alleged, was that the spirits in question were manufactured in the United States, and that having been so manufactured they were at the time of seizure, and had been for a long time before, subject to a tax imposed thereon, under the acts of Congress relating to internal revenue; that the barrels containing the spirits were then and there found elsewhere than in a bonded warehouse, to wit, in a store and building occupied by the firm of one of the claimants, which was not a bonded warehouse; that the tax so imposed on the said distilled spirits had never been paid, and that the said distilled spirits had not then and there been removed from a bonded warehouse according to law. Subsequent to the filing of the information, the claimants appeared and severally pleaded that the goods did not, nor did any part thereof, become forfeited as alleged in the information, and that none of the allegations in the information were true.

Issue was joined upon each of those pleas, and the verdict of the jury was in favor of the United States. Exceptions were taken by the claimants to the refusal of the court to instruct the jury, as requested, and also to the instructions of the court as given to the jury. Separate claims were filed by the respective claimants for distinct portions of the spirits seized, and in making their defence they set up, in certain aspects of the case, very different theories, both in the pleadings and by the bill of exceptions. Prior to the seizure several hundred barrels of spirits of domestic manufacture deposited here, in the bonded warehouses of the United States, had been withdrawn upon application made in due form to the collector of the district. The application represented that the spirits were to be transported to Eastport, in the State of Maine, for exportation to a foreign market; but

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the several bonds given in the case, as required by law and the regulations of the department, proved to be false and fraudulent; and the bill of exception stated that the spirits were not so transported, nor were they intended to be transported, as represented in the application to withdraw the same, but were removed for sale and consumption in this district without the payment of the taxes.

The spirits seized in this proceeding were found in this district, as the evidence tended to show, in a building occupied by the claimants, but not a bonded warehouse, and were at the time of seizure in their possession. The theory of the United States was, that the spirits seized were a certain part of the spirits previously withdrawn from the bonded warehouses, by means of those false and fraudulent bonds, and that the claimants were parties to the conspiracy by which the same were so withdrawn without the payment of the taxes, and in fraud of the laws of Congress providing for the assessment and collection of the internal revenue. The claimants denied that the spirits in controversy were any portion of the spirits so fraudulently withdrawn from the bonded warehouses, and insisted that the one hundred and twenty-four barrels embraced in the claim first filed had been put in leaches, with other lots of spirits, and mixed and rectified so that it was impossible to identify any one lot from another, as when originally put into the leaches. Several answers were made by the Government to that defence.

It was insisted that the spirits in question were a part of the identical spirits so fraudulently removed from the bonded warehouses, and denied that they had ever been mixed with any other lots as alleged.

That the mixing of the spirits, if done as alleged, was intentionally and fraudulently done by the claimants, with the knowledge that the same had been so withdrawn by fraud from the bonded warehouses, and for the purpose of destroying the identity of the spirits, and to defraud the United States of the tax imposed on the spirits. Harrington contended that he bought the spirits described in the claim through and by means of the other claimant, as his agent, and they both claimed that they

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purchased the spirits in open market, and without any knowledge that the same had been fraudulently withdrawn from the bonded warehouses ; but the Government insisted that the spirits were in the possession of the claimants at the time of seizure, and that they intended to sell and remove the same, in fraud of the internal revenue laws, and with the design to evade the payment of the taxes.

Evidence was introduced, as stated in the bill of exceptions, tending to prove the facts as claimed both by the United States and the claimants, and it was admitted that the seizure was made before the expiration of the time allowed by the regulations of the department for the completion of the transportation. Forfeiture of the spirits seized was alleged, in the first count of the information, for a violation of the provisions contained in § 44 of the act of July 13, 1866, which enacts that persons who shall remove any distilled spirits from the place where they were distilled, otherwise than into bonded warehouses, as provided by law, shall be liable to a penalty or to imprisonment, and the provision is, that all distilled spirits so removed, and that all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed on the same not having been paid, shall be forfeited, and may be seized and sold for the tax and expenses of seizure and sale. See 14 Stat. at Large, 163.

*G. S. Hillard*, U. S. District Attorney, District of Massachusetts.

*R. M. Morse, Jr.*, for claimants.

CLIFFORD, J. Merchandise, articles, or objects on which taxes are imposed by the provisions of law, found in the possession or within the control of any person, in fraud of the internal revenue laws, or with the design to avoid the payment of such taxes, may be seized as provided in § 9 of the act of July 13, 1866, and the provision is, that the same shall be forfeited on that account. 14 Stat. at Large, 111.

Founded, as the second and third counts are, upon that provision, it is quite clear that they are drawn with technical accuracy, and it is not necessary to examine the fourth and fifth counts, as they were withdrawn before verdict. See also 13



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Stat. at Large, 240 ; 14 Stat. at Large, 160, 162. All necessity for any discussion in regard to facts of the case is removed by the verdict of the jury, which shows that the theory assumed by the United States is correct ; that the spirits described in the information were parcel of the spirits previously withdrawn from the bonded warehouses by means of the false and fraudulent bonds, and that the claimants were parties to the conspiracy by which the same were so withdrawn without the payment of the taxes to which they were subject under the internal revenue laws. Nothing, therefore, remains to be considered but the exceptions to the rulings and instructions of the court. Examination will first be made of the exceptions taken by the claimants to the rulings of the court in refusing the prayers they presented for instructions to the jury. They requested the court to instruct the jury that the spirits, if they had been deposited in a bonded warehouse, and had been removed therefrom upon application to the collector and by his authority, for rectification or transportation for exportation, were not liable to forfeiture. Unlimited as the language of the request is, argument is hardly necessary to show that it was properly refused, as the language is broad enough to save the spirits from forfeiture, even if found in the possession and within the control of the party who fraudulently withdrew them from the bonded warehouse.

Fraud, it is sometimes said, will vitiate anything, but the request in this case makes no distinction between a possession obtained by fraud and that acquired according to law. Strictly examined, the theory of the request is, that the spirits were not liable to forfeiture if they had been formally withdrawn (no matter by what means) from the bonded warehouse where they had been deposited ; but the court is of the opinion that a permit obtained by fraud from the collector to withdraw the spirits, as respects the perpetrator of the fraud, is a mere nullity, and such a party would have no better right to the possession of the spirits than he would have had if they had been stolen by him, or than he would have had if he had taken them by force from the public warehouse.

Precisely the same objections apply to the second request for

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instruction to the jury, which was that if the spirits had been removed from a bonded warehouse upon application to the collector, and upon giving bonds to his acceptance and upon his permission, and were seized before the expiration of the time allowed for the rectification or transportation, then the spirits were not liable to forfeiture. Like the preceding, this request is based on the theory of law, that if the spirits passed out of the bonded warehouse by consent of the collector, no matter if his consent was procured by the grossest fraud, or even by force, the spirits are not liable to forfeiture, even in the hands of the guilty party. Such a theory cannot be adopted, and need not be further examined. Apart from the qualification appended by the court to the third request, it would need no explanation, as it was given as requested, so far as respects the first-named claimant. The substance of the request was, that if the spirits had been removed from a bonded warehouse, as supposed in the preceding request, and had been bought by the claimants of the party who withdrew the same, or his agent, without knowledge of the fact that the bonds furnished were worthless, or that the spirits were removed from the warehouse with intent to defraud the United States, then the spirits were not liable to forfeiture. Given as the request was, so far as respects the first claimant, he has no grounds of complaint, unless it be with the verdict of the jury, as will presently more fully appear. Stated in the exact words of the court, the qualification annexed to the request was that if Boyden bought the spirits as agent for Harrington, and Boyden was cognizant of the fraud, Harrington would be so, and by his knowledge. Whether the knowledge Boyden had of the fraud was acquired before or after he was agent, to make the purchase for his principal, does not appear, but for the purpose of this investigation it must be assumed that it was before he was so employed, as the instruction, as given, is broad enough to include both theories. Authorities are not wanting where it is held that the principal is not bound by any such knowledge of his agent, unless the agent acquired the knowledge subsequent to his employment. *Bank of United States v. Davis*, 2 Hill. 460; *Howard Ins. Co. v. Halsey*, 4 Seld. 274; *Weiser v. Denison*, 6 Seld. 77; *N. Y. Cen-*

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*tral Ins. Co. v. Nat. Protection Ins. Co.*, 20 Barb. 476 ; 1 Pars. on Con. 75 ; 2 Lea. Cas. in Eq. 164. Those authorities hold that unless notice of the facts in question come to the knowledge of the agent while he is concerned for the principal, and in the course of the very transaction in which he is employed, the principal is not affected by the knowledge of the agent ; but Judge Story admits that if the knowledge was acquired by the agent so near the transaction that the agent must be presumed to recollect it, the principal is affected by that knowledge. Story on Agency (16th ed.), § 140. Such was the express ruling of the court in the case of *Hovey v. Blanchard*, 13 N. H. 145, and the reasons assigned in support of the ruling appear to be correct. *Patten v. Ins. Co.* 40 N. H. 375 ; *Hargreaves v. Rothwell*, 1 Keen R. 158 ; *Fuller v. Bennett*, 2 Hare, 404 ; *Hart v. Farmers' and Mec. Bank*, 33 Vt. 252 ; 13 Am. Law Reg. 138.

Contrary decisions have been made upon the point in the courts of the past century. The Court of Common Pleas held, in the case of *Norwood v. Dresser*, 108 Eng. C. L. 585, that the principal was not affected in the sale and purchase of merchandise with any knowledge acquired by his agent before his employment, but the case was carried to the Exchequer Chamber, where the judgment of the Common Pleas was unanimously overruled. Where the agent of the buyer purchases, on behalf of his principal, goods of the factor of the seller, the agent having present in his mind, at the time of the purchase, that the goods he is buying are not the goods of the factor, though sold in the factor's name, the knowledge of the agent, however acquired, says the court, is the knowledge of the principal. *Dresser v. Norwood*, 17 C. B. N. S. 481. By the instruction in this case, the jury were told that if the agent was cognizant of the fraud at the time of the purchase, the principal was bound by that knowledge, and I am of the opinion that the charge was correct, whether the knowledge of the agent was acquired at that time or the day before, as the requirement of the instruction was, that the jury must find that the agent was cognizant of the fraud at the time he made the purchase, else they would not be justified in finding that the principal was affected by the antecedent knowledge of

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the agent. Beyond question, the jury found that the first-named claimant was in the possession of the spirits with knowledge, at the time he made the purchase for the other claimant, that they had been withdrawn by fraud from the bonded warehouses, and that the tax to which they were subject had not been paid. Suggestion is made that the evidence did not warrant the finding of the jury, but the decisive answer to that suggestion is, that the only office of a bill of exceptions is to bring before the appellate court such questions as were duly raised and properly saved in the subordinate court.

Exception was also taken to the ruling of the court in refusing to give the fourth request for instruction, which was to the effect as follows: That if the spirits, proved in the case not to have paid a tax, had passed through the rectifiers in which there were other spirits, and had in that way become mixed with them, then no portion of the spirits when rectified would be liable to forfeiture; but the court refused to give the instruction as requested, and instructed the jury to the effect following: That if the spirits seized came from the rectifiers in which the spirits so fraudulently withdrawn from the bonded warehouses were mixed with other lots belonging to the claimants so that they could not be distinguished, the United States were entitled to a forfeiture of a fair proportion of the mixture, even though the mixture might have been innocently made, provided the jury were satisfied, from the evidence under the instructions given by the court, that the spirits so fraudulently withdrawn would be by law forfeited if they had not been so mixed with other lots. That if the jury were satisfied, as aforesaid, that the spirits so fraudulently removed would have been forfeited if they had not been so mixed, and the jury also find that they were fraudulently so mixed by the claimants with knowledge that they had been so removed by fraud, and for the purpose of destroying the identity of the spirits and of defrauding the United States, then the entire quantity seized is forfeited. Extended reply to the objections taken to the ruling of the court in refusing to give the fourth request for instruction is unnecessary, as it obviously assumed that the rights of the United States

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were wholly lost by the intermixture, however made and by whomsoever the act was done. Such a rule cannot be adopted, as it merges all distinction between an innocent and fraudulent act, and requires the same finding by the jury, whether the mixture was occasioned by mistake or was the result of fraudulent design. Cases where the intermixture is made by mutual consent or by the act of a third person need not be considered, as it is conceded that the intermixture in this case was by the act of the claimants, and it is not pretended that the United States consented to the act. Where the intermixture was made wilfully and not by mutual consent, by the rules of the civil law, he who made it acquired the whole upon the ground of conversion, but the common law adopted the opposite rule, and with more policy and justice to guard against fraud, gave the whole property, without requiring any account, to him whose property was originally invaded, and its distinct character destroyed. 2 Kent Com. (11th ed.) 448; *Ryder v. Hathaway*, 21 Pick. 305; *Hart v. Ten Eyck*, 2 Johns. Ch. R. 62; *Willard v. Rice*, 11 Met. 493; *Wingate v. Smith*, 20 Me. 289; *Taylor v. Jones*, 42 N. H. 25. Many exceptions, however, exist to that rule, and it is said that it is never carried further than necessity requires, and it is certain that it never applies in cases where the goods can be distinguished and separated, as in that case no change of property takes place. 3 Bl. Com. 405; *Frost v. Willard*, 9 Barb. 440; *Curtis v. Groat*, 6 John. 168. Divested of immaterial matters, the case before the court presents the following facts. Distilled spirits fraudulently withdrawn from the bonded warehouses, and liable to forfeiture on that account, were mixed by the claimants with other similar spirits of their own property, and the mixture so made by the claimants was passed through the process of rectification; and the question is, whether the rectified product was subject to seizure and forfeiture, because one moiety of the mixture had been fraudulently withdrawn as aforesaid from the bonded warehouses.

Examined carefully, it will be seen that the fourth request for instruction affirms that no portion of the spirits under those circumstances would be liable to forfeiture, and

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as framed it admits of no exception or qualification, and therefore is plainly erroneous, as it is clear that the spirits seized would be liable to forfeiture if the claimants knew, when they made the mixture, that the spirits which they mixed with their own had been fraudulently withdrawn from the bonded warehouses, and were then and there liable to forfeiture on that account. Exceptional cases undoubtedly arise even under the rules of common law, where it is held that an undistinguishable confusion of goods with other goods of similar species works a conversion, and that the title passes to the party in possession; but the general rule is certainly the other way, unless the effect of the intermixture was not only to destroy the identity, but to convert the substance into a new species. Different rules apply where the intermixture is of goods or substances of different species, or where the effect of the intermixture is to produce something of a different species, unless the new species can be reduced to its former rude materials or elements. *Pratt v. Bryant et al.*, 20 Vt. 333. Several cases decide that where the effect of the intermixture is to produce an entirely different species, then it may be held that there is a conversion, and the person whose property has been innocently taken loses his property, but has a right of action to recover its value. *Silsbury v. McCoon*, 3 Comst. 379; *Davis v. Easley*, 13 Ills. 192; *Betts et al. v. Lee*, 5 John. 348; *Brown v. Sax et al.*, 7 Cow. 95.

Whenever goods of a similar kind are innocently intermixed, so that they cannot be distinguished, and they are not substantially destroyed, by the production of something of a different species, the several owners may reclaim their respective shares, and may take possession of the same wherever they can find it, if they can do so without a breach of the peace, or they may bring trover for the value of their respective proportions against the person in possession, after demand and notice. *Ryder v. Hathaway*, 21 Pick. 298; *Pratt v. Bryant et al.*, 20 Vt. 333; *Colwill v. Reeves*, 2 Camp. 576; *Bryant v. Ware*, 30 Me. 295; *Beach v. Shmultz*, 20 Ill. 185; *McDowell v. Rissell*, 37 Penn. St. 165. Apply these rules to the first instruction given by the court, and it is clear that it was quite as favorable to the claimant.

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ants as they had any right to expect. Rectification did not change the species of the spirits, but the effect of passing them through the rectifiers was to remove impurities, and perhaps to raise their value, and the instruction given by the court saved to the claimants the benefit of any such improvement in the spirits. The correctness of the second instruction is too obvious to require any argument in its support. Objection is also made that the ninth section of the act of July 13, 1866, affords no legal foundation for the second and third counts in the information. Taxes were imposed on these spirits by the provisions of law, and they were found in the possession and custody of the claimants, and within their control, and it must be assumed, under the finding of the jury, that the claimants held the spirits in possession, for the purpose of selling and removing them, in fraud of the internal revenue laws, and with design to avoid the payment of the taxes, and the provision is, that all such merchandise, articles, or objects may be seized by the collector, and the same shall be forfeited. *United States v. One Still*, 5 Int. Rev. 189.

Judgment affirmed.



## LEWIS C. ENGLAND v. ABIJAH THOMPSON et al.

BEFORE CLIFFORD AND LOWELL, JJ.

The provision in a license to use a patented invention on machinery used in tanning was, that the defendants might enlarge their vats, or increase the number by paying an additional patent-fee in the same proportion as that stipulated in the license for the vats constructed at the date thereof. The defendants enlarged their tannery after license, and in the new part made new vats, in twelve of which they used the patented improvements. By the terms of the license the defendants acquired the right to make and use the improvement to the capacity of their tannery, embracing one hundred and sixty-nine bark vats, and containing sixteen thousand seven hundred cubic feet. They did not put the improvement into a third of the vats in their tannery at the date of the license, or use it in vats containing in the aggregate one half the cubic feet authorized. *Held* that the plaintiff could not recover damages for the use of the improvement in the new part, as the defendants had not used the improvement to an extent greater than provided for in the license at the date thereof or greater than the capacity of the tannery before it was enlarged.

The defendants were empowered by the license to use the patented improvements up to the date of the expiration of the patent of earlier date. They continued, however, the use



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of the patented improvements after that time against the protest of the plaintiff. The defendants insisted that they had a right so to continue the use of the improvements covered by the first patent under the provision of the license to the effect that if they wished to continue to use such improvement during what remained of the term of the second letters-patent, after the first had expired, they might do so by paying an additional patent-fee equal to one half the amount agreed to be paid for the term which expired with the older patent, and that the only remedy for the plaintiff was assumpsit to recover the additional patent-fee; but the court *held* otherwise, because, 1. the license expired with the term of the first patent; 2. the stipulation in question was only an agreement to grant an extension of the license which the defendants might accept or not; 3. if they elected to refuse the license and did not use the improvement, the plaintiff would have no cause of action. Therefore, if defendants elected to take the license, they must pay the required additional patent-fee before they could acquire the right to use the improvement beyond the term of the first patent.

TRESPASS on the case for infringement of letters-patent. Certain improvements in machinery used in tanning, and also in the construction of vats used for the same purpose, were invented by the plaintiff prior to May 17, 1851, for which he held letters-patent, issued in due form of law, securing to him the exclusive right and liberty, for the respective terms therein mentioned, to make and use those improvements and vend the same to others to be used; and the evidence, as reported, showed that the plaintiff on that day, by an instrument in writing of that date, authorized and licensed the defendants to make, construct, and use in the tannery then occupied by them, situated at Woburn, in this District, his said "improvements in tanning to the extent and capacity of the present size of their tannery," which then had one hundred and sixty-nine bark vats, the whole containing sixteen thousand seven hundred cubic feet. Letters-patent for the first-named improvement were granted to the plaintiff on June 19, 1847, and for the other improvement on December 24, 1850, as recited in the instrument of license. Provision was made in the license that if the defendants should thereafter extend the size of their tannery "by enlarging or increasing the number of vats," the plaintiff should have the right to demand an additional patent-fee in the same proportion as that charged for the then existing number of vats and their contents.

By the terms of the license the plaintiff granted, sold, assigned, and transferred to the defendants the exclusive right and liberty to make, construct, and use his improvement in their tannery

for the period of fourteen years from the date of the first patent ; but the stipulation in the same instrument was that if the defendants wished to continue the use of the improvements in their tannery for the additional time of three years and six months to the end of the term of the second letters-patent, they should have a right to do so by paying an additional patent-fee equal to one half the amount agreed to be paid for the license granted as stipulated in the instrument. They did continue to use the improvement described in the second letters-patent for the additional period of three years and six months, but they neglected and refused to pay any additional patent-fee for such use, although the same was duly demanded of them by the plaintiff, who seasonably requested them to take a license for that period, insisting at the same time that they had no right to use the improvement under the license to which reference has been made. He also claimed that they had built a new tannery, and that they were infringing his letters-patent by using the patented improvements in such new tannery. Unable to find redress by other means, the plaintiff brought the present action for damages for the alleged infringement of his patent. The writ was dated April 29, 1867, and the declaration was founded on the patent of December 24, 1850, and the reissued patent December 17, 1864, as extended from the date of the original patent. Infringement was alleged on January 2, 1865, with the usual allegation claiming damages, both before and after that day, so that damages were claimed as well upon the original as the extended term of the patent. Before the hearing the parties filed a stipulation in writing with the clerk, waiving a jury, and submitting the cause to the court to be heard, as provided in the act of Congress upon that subject. 13 Stat. at Large, 5. Subsequent to the submission of the cause, the evidence was taken in open court, and was fully reported to the acceptance of both parties.

*T. L. Wakefield* for plaintiff.

*Converse* and *Kelly* for defendants.

CLIFFORD, J. The theory of the plaintiff is that the defendants constructed another tannery, in addition to the one occupied by them at the time the license was executed, and he alleges that

they have wrongfully constructed and used his patented improvements in their new tannery, and claims damages on that account. He also claims damages for the use of the same, from the expiration of the first letters-patent to the end of the original term of the second letters-patent, embracing a period of three years and six months, and also from the date of the renewal of the second letters-patent to the date of the writ. Denied as the several claims are by the defendants, they will be separately considered, and also because they are based upon entirely different facts and circumstances.

No question is made as to the validity of the patent, and the defendants virtually admit that they have used the improvements of the plaintiff during the whole period, as alleged in the declaration. Considered in the order adopted at the argument, the first question presented for decision is, whether the defendants have used the patented improvement in any tannery other than the one they occupied at the date of the license. They never had but one license, and they deny that they ever used the patented improvement in any tannery other than the one therein described, and the plaintiff, in the view of the case taken by the court, fails to sustain any such claim. Undoubtedly the defendants enlarged their tannery subsequently to the date of the license, and the evidence shows that they constructed in the new part of the same some twenty-eight or thirty new vats, in twelve of which they used the patented improvements belonging to the plaintiff. Indefinite as the evidence is, it is not possible to give any precise description of the location of the old part of the tannery, except that it bordered upon a brook, which flowed past it, on one side, and that the new part or enlargement was constructed on the opposite side of the stream, some fifty or a hundred feet distant, but it appeared that when the enlargement was made, the engine and beam-house in the old part was moved to a new locality, for the use of both, showing to the satisfaction of the court that what was done by the defendants was properly to be regarded as an enlargement of the old tannery and not as the construction of a new one, as supposed by the plaintiff. When the license was granted, the defendants had in their tannery one hundred and sixty-nine bark

vats, and by the terms of the license they acquired the right to make, construct, and use the patented improvement to the extent and capacity of their tannery, embracing one hundred and sixty-nine bark vats, containing sixteen thousand seven hundred cubic feet, and the provision was, that they might enlarge the vats, or increase the number, by paying an additional patent-fee, in the same proportion as that stipulated in the license for the vats previously constructed, but they never put the improvement into one third part of the vats which were in the tannery at the date of the license, nor did they ever use the improvement in vats containing in the aggregate one half the number of cubic feet, as authorized by the terms of that instrument. Viewed in any light, the first ground of claim set up by the plaintiff is not supported by the evidence.

Authority to make, construct, and use both the patented improvements of the plaintiff was granted to the defendants by the license to June 19, 1861, when the term of the first letters-patent expired, but the term of the second letters-patent, as originally granted, extended for three years and six months longer, and the evidence shows to a demonstration, that the defendants continued to use that improvement throughout that entire period without consent or license of the plaintiff, and in spite of his objections and repeated remonstrance. Although informed by the plaintiff that their license had expired, and requested to take a new one, the defendants refused so to do, or in any manner to recognize the right of the plaintiff, insisting that they were still protected in using the improvement under the old license by virtue of the stipulation therein contained, that if they wished to continue to use the improvement in their tannery, for what remained of the term of the second letters-patent, when the term of the first letters-patent expired, they might do so by paying an additional patent-fee, equal to one half the amount agreed to be paid for the term which expired with the term of the first letters-patent, and they still insist that they lawfully continued to use the improvement under that stipulation in the old license, and that the only remedy for the plaintiff is an action of assumpsit to recover the additional patent-fee ; but the court is of a different opinion, for several reasons : —

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Because the license expired with the term of the first letters-patent.

Because the stipulation in question is but an agreement to grant an extension of the license which the defendants might take or refuse.

Because, if they elected to refuse the license, and did not use the improvement, the plaintiff would have no cause of action, and consequently if they elected to take it, they must pay the required additional patent-fee before they could acquire the right to use the improvement beyond the time of the first letters-patent. Regarded as a license, there is much force in the suggestions of the defendants that the payment of the patent-fee is not a condition precedent to the right to use the improvement, but the stipulation is nothing more than an agreement to grant a license, should the defendants elect to take one, on the conditions therein specified, and when viewed in that light it is clear that the plaintiff is right, and the defendants liable as infringers, as they refused to take the license or to pay the additional patent-fee as stipulated in the old license.

Extended remarks upon the third ground of claim set up by the plaintiff is unnecessary, as the use of the improvement under the extended term of the letters-patent to the date of the bill of complaint is admitted, and as it appears that all right of the defendant to use the improvement under the license had ceased three years and six months before the certificate of renewal took effect. Suggestion was made at the argument that the case is controlled by the rule laid down in the case *Chaffee v. Boston Belting Co.*, 22 How. 222, but it is obvious that the two cases are wholly unlike, as the instrument in this case is a license, and not an assignment, and also because the right of the defendant to use the improvement in question had terminated three years and six months before the certificate of renewal was granted.

Referred to a commissioner to report the actual damages sustained by the plaintiff, subject to the revision of the court, and when the amount of the damages is ascertained the plaintiff to be entitled to judgment.

## NEW HAMPSHIRE DISTRICT.

OCTOBER TERM, 1869.

THOMAS SANDS in Equity v. P. S. WARDWELL et als.

BEFORE CLIFFORD AND CLARK, JJ.

Letters-patent are issued upon the adjudication of a public officer, and the presumption is that the adjudication was correct.

Letters-patent, if in due form, when introduced in evidence, afford a *prima facie* presumption that the person named as inventor is the original and first inventor of what is therein described as the improvement.

The burden of proof to sustain an opposite conclusion is therefore on the party attacking the patent.

Upon the question of infringement the burden of proof is with the complainant.

Technical equivalents do not belong to a combination of old elements.

Such a combination is only an improvement upon what was before known, and without the new combination the whole would have been the property of the public.

When such a combination is patented it is infringed by every subsequent combination of the same elements as those which compose it; and no subsequent combination is substantially different from the patented one, merely because it was in a single device different from one of its elements, provided such substituted device was at the date of the patent a well-known substitute for the omitted one.

Subsequent inventors may obtain valid patents for combinations of the same elements as those which compose a prior one, provided the combinations are substantially different, and accomplish new and useful results.

No person is to be treated as an infringer who does not use all the elements of a combination, unless the change is merely formal or colorable; and every subsequent combination is only a colorable change when not substantially different from the first.

LETTERS-PATENT were granted to the complainant, June 23, 1864, for an improvement in machines for making machine knitting-needles. On November 15, 1864, the patent was re-issued to him, as he alleged, for the same invention, in due form of law for the residue of the original term. The present suit was founded upon the reissued letters-patent, and the charge in the bill of complaint was that the respondents, since the issuing of the reissued letters-patent, had manufactured and used ma-

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chines and machinery embracing mechanism substantially the same in principle, construction, and mode of operation as the patented improvement of the complainant. The principal defences set up in the respective answers of the respondents were as follows : —

1. That the reissued letters were fraudulently procured.

2. That the complainant was not the original and first inventor of the improvement.

3. That the invention, or substantial and material parts thereof, claimed by the patentee as new were known to and used by others with the knowledge of the complainant, and with his consent and allowance, more than two years prior to his application for the original patent.

4. Besides these special defences the principal respondent denied that he or either of the other respondents ever made, used, or vended to others to be used, any machine or machines embracing the patented improvement of the complainant. On the contrary, he alleged that he never constructed within the period mentioned in the bill of complaint but one machine for the purpose of making knitting-needles, and he averred that he invented and made the same, and that the mechanical devices employed in the said machine were substantially different from those described in the reissued patent of the complainant, and that neither he nor the other respondents had in any manner infringed the complainant's improvement or any part of what was claimed in the said reissued letters-patent.

*J. H. George and Foster and Sanborn*, for complainant.

*J. Marshal and W. H. Y. Hackett*, for respondents.

CLIFFORD, J. The proofs introduced by the respondents in support of the allegation of fraud in the procurement of the letters-patent are not sufficient to sustain the charge, and the defence in that behalf is therefore overruled. Further explanations upon the point are unnecessary, as the proofs are quite unsatisfactory and insufficient. Power to grant letters-patent is conferred by an act of Congress upon the commissioner of patents—Issued, as such letters-patent are, in pursuance of the adjudication of a public officer, the presumption is that the adjudication



was correct. Founded upon that consideration, the settled rule of law is, that letters-patent when introduced in evidence in a suit in equity or at law, if they are in due form, afford a *prima facie* presumption that the inventor is the original and first inventor of what is therein described as his improvement. Such being the *prima facie* presumption to be drawn from the letters-patent when introduced in evidence, it follows as a necessary consequence that the burden of proof to establish a contrary conclusion is upon the opposite party. The allegation of the respondents is, that the complainant is not the original and first inventor of the improvement described in the reissued letters-patent. They make the charge and they must prove it, and they have made the attempt, but they have failed to sustain that issue in the pleadings. Extended discussion of a point so clear as that one is in this case would be useless, and consequently we think it sufficient to state our conclusion. Nothing remains to be considered in the case but the question of infringement, and in that issue the burden of proof is upon the complainant. He alleges that the respondents have infringed his reissued letters-patent and prays for an account and an injunction, and unless he proves the charge his bill of complaint should be dismissed, as he is not entitled to any relief.

The statement of the patentee is, that his machine is intended to save a great part of the labor heretofore required in making machine knitting-needles by hand, and that it is so constructed that the several operations of carrying forward the steel wire to the block making the eye, stabbing down the wire to the proper shape, and cutting off the wire in a suitable length for a needle, are all performed automatically. His statement also is, that what is termed the eye of the needle is not a perforation through the wire, but a cavity pressed to receive the point or barb for the purpose specifically set forth in the specification (minute description of the mechanism of the machine and of its mode of operation is given in the specification, which need not be reproduced). Having described the mechanism, the patentee concludes his specification by making four claims; and the complainant insists that the respondents have infringed such parts of

his invention as are embraced in the first, second, and fourth claims of the patent. Further reference to the third claim will not be made, as it was conceded at the argument that the complainant had failed to show any infringement in that behalf. Brief notice of the first claim will also show that the complainant is in no better condition in respect to that, as the machine of the respondents contains no such combination as is therein described. Complainant's invention as described in that claim is the burr or equivalent cutter for stabbing that part of the wire which is to form the barb or beak of the needle, in combination with the means or the equivalent thereof for holding the wire by the eye which has been formed substantially as described, in order that the flattening of the wire by the burr or equivalent cutter may be in proper relation to the eye. Beyond question one of the elements of the combination, by the express words of the claim is the means described for holding the wire by the eye, and the patentee in that patent is bound by those words. They are a part of the claim, and cannot be rejected as surplusage without meaning. Respondents' machine contains no such means of holding, nor does their machine contain any such element. Infringement therefore of the first claim is not proved.

The second and fourth claims may, to a certain extent, be considered together in respect to the issue of infringement. Before attempting to analyze the second claim, it may be useful to repeat the language, which, in the words of the patentee, is "the combination substantially as described of the means for forming the eye, the means for stabbing that part of the wire which is to form the barb or beak of the needle, and the means for cutting off the wire"; and the patentee in this connection repeats the phrase substantially as described. Stated in other words, the means of forming the eye are those means which advance the wire to the proper position under the punch, the means of holding it there while the punch operates, and the punch and the means which operate it as it performs its described function. Such part of the wire as is designed to form the barb or beak of the needle is subjected to the process of stabbing. In order to accomplish that result in the manner described, there

must be a burr or cutter, and the wire must be advanced under the cutter, and there must be means for bringing the cutter down so that it will operate on the wire. Unless the wire is held while the cutter operates, the machine would be a failure; and it is equally essential that the cutter should be withdrawn at the proper time. The remaining ingredient of that claim is the means of cutting off the wire, which are a fixed shear-cutter, or die, as it is called by some of the witnesses, — and a movable cutter, together with the described means of operating the same. Guided by these explanations, it becomes necessary, in order to determine whether the respondents have infringed this claim, to compare their machine with the invention of the complainant as described in the specification.

Both machines have a similar punch, but the means of operating them in the two machines are unlike in construction, but perhaps are substantially the same in principle and mode of action. Differences are apparent in comparing the respective means employed in the two machines in forming the eye of the needle, but they are not as material as those observable in the respective means employed for stabbing the wire. Unquestionably they have a similar burr or cutter, which is capable of being raised or lowered so as to cut more or less into the wire. They also have means of removing the cutter entirely from the wire, but they are substantially different in the means employed to raise and lower the cutter and govern its operation. The cutter in the complainant's machine is mounted on the arm of a lever, while the other arm of the same lever operates over a cam, and in that way determines the form of the stabbing. Turning to the respondents' machine, it is at once seen that it has no cam, but the wire rests upon an inclined bed, with the part designed for the point of the needle slightly elevated. The cutter is brought down, by the use of a toggle joint, or hinged lever, so as to strike the end of the wire cutting into it and forming the point of the needle, and as the cutter advances, cutting less and less deeply into the wire by reason of its inclination upon its bed until it is finally withdrawn altogether by the operation of the toggle joint. The machine of the complainant is in this respect quite dissimilar in

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construction and mode of operation. Their machine has no cam, nor is the device employed in their machine a known substitute for such an instrumentality. These two machines are also quite unlike in respect to the respective means they employ in holding the wire while it is stabbed to form the barb of the needle. In the complainant's machine the punch is forced into the eye of the needle, and remains there holding it down upon the bed, and then at the proper moment moves forward with the wire and the bed, still holding the wire by the eye of the needle while the point of the preceding needle is being stabbed and the barb thereof formed.

The next step in the operation is, that the blank, so called, thus stabbed, is cut off, and the punch returns to the position from which it started to operate, hold, and bring forward another needle. No such means for holding the wire is found in the machine of the respondents. On the contrary, it has a set of "holding dies which, after the wire is cut off, grasp it firmly and present and hold it for the action of the cutter."

The substance and effect of the fourth claim is for a combination of the bed on which the wire is supported during the operation of stabbing the burr or equivalent cutter for stabbing the wire, the means described for causing the cutter to act upon the wire in the direction of its length, and a cam or equivalent pattern to govern the cutter's motions to and from the wire so as to determine the form of the stabbing. Technical equivalents do not belong to a mere combination of old elements. Such a combination is regarded merely as an improvement upon what was before known, and which, without such new combination, would have belonged to the public. Inventors of such improvements, if their rights are secured by letters patent, may treat all others as infringers who make, use, or vend to others to be used, any and every subsequent combination of those elements not substantially different; and no such subsequent combination is substantially different merely because the person constructing a machine under it employs a different device for one of the elements, provided such device was, at the date of the first patent, a well-known substitute for such omitted element. Other inventors may secure valid

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patents for subsequent combinations of the same elements, provided the combination is substantially different and the invention produces a new and useful result; but no person can be treated as an infringer who does not use all of the elements of the first combination, unless the change is merely formal or colorable, as every subsequent combination is which is not substantially different, and no subsequent change can be regarded as substantially different merely because it drops one of the elements of the one patented and employs in its stead another, which, though different in form, was well known at the date of the patent as a common substitute for the element so dropped.

Applying these principles to the present case, it is quite clear **that** the proofs do not show that the respondents have infringed **upon** the second or fourth claims of the complainant's patent. **They** have no cam, nor have they any equivalent device, nor is **the** device which they employ a well-known substitute for the **one** to be found in the complainant's machine. Viewed in any proper light, their machine must be regarded as a substantially different combination, as they do not employ all the elements found in the complainant's machine. No allusion has been made to the evidence tending to show that the principal respondent saw the complainant's machine used, and had opportunity to copy it, as it appears that the machine was then protected by letters-patent, and it is quite as probable that he examined it to avoid an infringement as to copy the improvement.

Bill of complainant dismissed with costs.

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Stockwell *et al.* v. The United States.

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## MAINE DISTRICT.

APRIL TERM, 1870.  

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DAVIS R. STOCKWELL *et al.*, Plaintiffs in Error, v. THE UNITED STATES.

BEFORE CLIFFORD AND SHEPLEY, JJ.

Although the act of March 2, 1861, does not enumerate shingles sawed, rived, or shaved, § 22 of the act provides that a duty of thirty per cent shall be collected on manufactures of wood, or of which wood is the chief component part, if imported from a foreign country, and not otherwise provided for, and the act of July 14, 1862, provides for five per cent *ad valorem* additional. *Held*, that shingles were within the said provisions of the revenue laws, and were not exempted by the Reciprocity Treaty with Canada, whence the importations were made.

Debt is the proper form of action for the recovery of the penalties sued for in this case.

All penalties and forfeitures incurred in consequence of the act under which this suit is brought may be sued for and collected as prescribed by the act to regulate the collection of duties on imports and tonnage. 3 Stat. at Large, 782, § 5; 1 Stat. at Large, 695.

Whenever the same plea may be pleaded, and the same judgment given on two counts, they may be joined in the same declaration.

Recovery for the duties and double values may be had in the same case.

Import duties are levied by act of Congress, and when the goods are imported without paying or accounting for them, the liability is complete for the illegal importation.

The liability for receiving, concealing, or buying is founded upon a distinct act from that of illegally importing. An agent or a consignee may be liable for both, and the two counts may be joined.

The Judge of the District Court has power, when it appears by complaint or affidavit to his satisfaction that a fraud on the revenue has been committed by any person intrusted with or concerned in the importation or entry of goods, to issue his warrant to the marshal requiring him to enter a place or premises where any invoices, books, or papers relating to the merchandise are deposited, in respect to which the fraud is alleged to have been committed, to take possession of such books and produce them before the judge.

It is not necessary that a complaint or affidavit should accompany the warrant. If the court is satisfied that the fraud upon the revenue has been committed, the warrant will be granted. The granting or refusing the warrant is a judicial act, and the complaint or affidavit is not necessary to be introduced where it appears, by the recitals of the warrant, that it was shown by complaint and affidavit to the satisfaction of the court that the alleged frauds on the revenue had been committed.

Where the warrant described the alleged frauds to be that defendants had at certain times committed frauds on the revenue by importing large quantities of shingles subject to

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duty by law, into the port of Bangor and other ports in the district, without paying or accounting for the duty to which the same were liable, it was *held* that the description was made with sufficient particularity.

It was *held* that shingles described in the warrant as the "growth and manufacture" of the provinces of Canada, were so described as to make their importation without paying duty a fraud on the revenue.

It is a defect in the warrant not to allege that the district judge became satisfied, by complaint and affidavit, that the alleged frauds on the revenue had been committed. This, however, could not avail the defendants in this case:—

1. Because, they did not at the trial except to the ruling of the court, admitting books, documents, etc. upon that ground.
2. Because the books, etc. were properly admitted, even if the search-warrant were illegal.

Exceptions to the ruling of a court in admitting evidence should be sufficiently specific to enable it to understand the precise ground upon which the objection is based.

All that appeared in this case was, that when the books, etc. were offered in evidence, the defendants objected that the court was not authorized to issue, or the marshal to serve, the warrant in question, and that the district attorney could not put them in evidence, because obtained by that warrant. *Held*, that the objections were not sufficiently explicit to avail the defendants at this hearing.

The district judge could put the papers seized under the warrant in this case into the hands of the district attorney.

It was objected that the books, etc. were not in themselves legal evidence. *Held*, that as the same were not set forth in the bill of exceptions, nor in any way made part of it, the presumption was that the ruling of the district judge was correct, and the point was not open for examination.

The objections were taken to the admissibility of a deposition: 1. That it did not appear that the magistrate had examined the deponent; 2. That it did not appear that the magistrate had reduced, or caused to be reduced, to writing the deponent's answers. 3. That it did not appear that the magistrate had reduced, or caused to be reduced, to writing the answers of deponent in his presence. The return stated that, 1. "An examination on oath of the deponent was had before me." 2. Cross and direct interrogatories accompanied the commission, and the magistrate's return was, "the following are the answers," to the direct and cross interrogatories, and also that "the signatures of the deponent affixed to this deposition are in his handwriting, and made in my presence." *Held*, that as the magistrate was to permit no person other than a clerk to be present at the examination except himself and the deponent, and as it did not appear that a clerk was appointed, the presumption was that no one was present but the deponent and the magistrate, and, if not, then either the magistrate or the deponent must be presumed to have written the answers, and, if by either, the first and second objections failed. 3. The fact that the signatures affixed were those of the deponent and made in the presence of the magistrate is an answer to the third objection.

One cannot claim property or the avails of it through the fraudulent acts of another without being affected by the act, especially if a partner, the same as if the act were his own.

Partners are liable *in solido* for the tort of one of their number, if the tort was committed by him as a partner, and in the course of the partnership business.

This was an action of debt by the United States to recover certain duties and penalties for the alleged illegal importation of



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shingles into the port of Bangor, in the District of Maine. The suit was brought in the District Court, where the jury returned a verdict for the plaintiffs. Thereupon, after the judgment, the defendants excepted, and by writ of error removed the cause to the Circuit Court. Large quantities of shingles, it was alleged, were imported into the port of Bangor by certain persons unknown, without paying the duties, and that the same were then and there unladen and delivered in violation of the provisions of the revenue laws; and the charge in the first eight counts of the writ was that the shingles were then and there received, concealed, and bought by the defendants. Founded on that and other charges, as set forth in the other counts, the United States sued the defendants in a plea of debt, the writ containing twenty-three counts. Seven of the counts — to wit, from the ninth to the fifteenth inclusive — alleged that the goods as imported were subject to duty, and that the defendants did then and there knowingly attempt to make, and did knowingly make, an entry of said goods by means of a false invoice; and the remaining counts — to wit, from the sixteenth to the twenty-third inclusive — were counts for the unpaid duties, in which it was alleged that the defendants or their agents imported the goods without paying or accounting for the duties. Service was made upon all the defendants named in the writ, but the death of Leeman Stockwell was suggested at the first term, and the other defendants appeared and pleaded the general issue, and upon that issue the parties subsequently went to trial. Double the value of the goods was claimed in the first eight counts, and the jury found for the plaintiffs upon all those counts except the seventh, upon which their verdict was for the defendants; and they also found for the defendants upon all of the seven counts constituting the second set, in which it was alleged that the defendants knowingly attempted to make and made entries of the respective importations by means of false invoices. Separate claims for the unpaid duties of the respective importations were made in the third set of counts, and upon those, except the twenty-second, the jury found for the plaintiffs; but they found for the defendants upon the twenty-second count, which had respect to the same importation as the seventh count in the first set.

Prayers for instructions were presented by the defendants in substance and effect as follows:—

1. That the first eight counts were bad, because they did not sufficiently aver the primary element of the charge that the shingles were in fact illegally imported.

2. That both the first and third set of counts were bad, because they did not so describe the shingles as to show that they were subject to duty.

3. That shingles imported from the adjacent Provinces at the date of the importations in question were not subject to duty; that they were entitled at that time to be admitted to entry free of duty, under the Reciprocity Treaty with Great Britain, though manufactured in part, if something remained to be done to complete the manufacture, as if the shingles were shaved but not jointed, as explained in the record.

4. That a civil action will not lie to recover the double values, and that the plaintiff could not recover in this action both the double values and the duties.

*Richard H. Dana, Jr.*, for defendants, plaintiffs in error.

In the District Court, *George F. Talbot*, United States District Attorney, appeared for the Government. The argument in the Circuit Court was made by *Nathan Webb*, at that time United States Attorney for this district.

CLIFFORD, J. Brought here, as the record is, by writ of error to the District Court, to revise certain rulings of that court and the judgment in the case, it will only be necessary to refer to such portions of the pleadings and evidence as are material to the questions presented for re-examination in the bill of exceptions. Goods brought from any foreign port or place are forbidden to be unladen and delivered before the duties are paid or secured to be paid, and the further provision is that persons who receive, conceal, or buy any goods knowing them to have been illegally imported and liable to seizure, shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods so received, concealed, or purchased. 11 Stat. at Large, 665; 3 Stat. at Large, 782.

Shingles, whether sawed or rived and shaved, are not enu

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Imported & c. The United States.

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mentioned in the act of the 31st of March, 1857, as an article of importation subject to duty: and the twenty-second section of the act provides that duties shall be levied, collected, and paid "on manufactures of wood, or of which wood is the chief component part," if imported from foreign countries and "not otherwise provided for," a duty of thirty per centum; and § 13 of the act of the 14th of July, 1870, added five per centum *ad valorem* in addition to the duties imposed by the prior act. 12 Stat. at Large, 122; 13th 557.

Responsive to the first request, the instruction given by the court was, that if the facts set forth in the counts were proved the allegations were sufficient to entitle the plaintiff to a verdict and the court here entirely concurs in that instruction, as the respective counts allege that the goods, being by law subject to the payment of duties, were on a certain day imported and brought from some foreign port or place, naming the port, by a certain vessel, giving the name thereof, into this district, naming the port, by persons unknown, without paying or accounting for the duties to which said goods were then by law so subject. Particular reference to the provision levying the duties and enacting the prohibition and imposing the penalty is never necessary, even in an indictment, as the Federal courts take judicial knowledge of the revenue laws, imposing duties and providing for their collection.

Most of the remarks made to show that the first prayer for instruction was properly refused apply with equal force as an answer to the objections taken to the refusal of the court to grant the second prayer. Nothing further need be added to show that the action of the court was correct except to say that the counts respectively aver that the goods were imported without paying or accounting for the duties to which they were by law subject. They are described as shingles and not as manufactures of wood but shingles are enumerated in the Treasury regulation as an article subject to duty, notwithstanding the Treaty of Reciprocity and it is a matter of common knowledge that shingles are manufactured from wood.

Manufactured of wood, as shingles are, they were clearly

within the before-mentioned provisions of the revenue laws, and as such were subject to a duty of thirty-five *per centum ad valorem* unless they were exempted by the terms of the Reciprocity Treaty, which was in full operation at the date of the several importations. "Timber and lumber of all kinds, round, hewed, and sawed, unmanufactured in whole or in part," are enumerated in the schedule annexed to the third article of that treaty, in which it is in terms agreed that the articles therein enumerated, "being the growth and produce of the aforesaid British Colonies or of the United States, shall be admitted into each country respectively free of duty." Unmanufactured timber or lumber of any kind, as well such as was hewed or sawed as that which was round, if otherwise unmanufactured in whole or in part, was entitled, under the treaty, to be admitted to entry as goods free of duty; but if the timber or lumber was otherwise manufactured than by rough hewing or sawing, whether in whole or in part, the product of such rough-hewed or sawed timber or lumber became and was subject to duty, as provided in the revenue laws of the United States in operation at the time the same was imported. Regulations upon the subject were promulgated by the Secretary of the Treasury on the 1st of February, 1857, and it appears that those regulations were founded upon the prior practice and decisions of that department. Articles entitled to entry free of duty are first enumerated in those regulations, and then follows a schedule of articles subject to duty under the revenue laws then in operation, and shingles, shingle bolts, and shingle wood are included in the enumeration.

Appended to that schedule is a general regulation upon the subject, which provides that "articles of wood remain liable to duty under the existing tariff, if manufactured in whole or in part by planing, shaving, turning, splitting, or riving, or by any process of manufacture other than rough hewing or sawing," and the Supreme Court in the case of the *United States v. Hathaway*, 4 Wall. 407, held that that regulation was "a sound construction of the" stipulation contained in the treaty. Round, hewed, and sawed lumber is admitted free of duty if otherwise unmanufactured in whole or in part. The article, say the court, may be

round, hewed, or sawed, but if it has undergone the process of manufacture, even in part, it is taken out of the free list. *United States v. Quimby*, 4 Wall. 408.

Debt, it is insisted, is not maintainable for a penalty, but it was decided otherwise in the case of the *United States v. Andrews*, and the court adheres to the opinion given in that case. All penalties and forfeitures incurred by force of the act under consideration may be sued for, recovered, distributed, and accounted for in the manner prescribed by the act entitled "An Act to regulate the Collection of Duties on Imports and Tonnage." 3 Stat. at Large, 732, § 5; 1 Stat. at Large, 695. Provision was made by § 89 of the principal Collection Act, that all penalties accruing by virtue of that act should be sued for and recovered *with costs of suit* in the name of the United States in any court competent to try the same; and it was made the duty of the collector within whose district the seizure should be made or forfeiture incurred, to cause suit to be commenced for the same without delay and prosecuted to effect. *United States v. Lyman*, 1 Mas. 482; *United States v. Bougher*, 1 McLean, 281; *Walsh v. United States*, 3 Wood & M., 341; *United States v. Allen*, 4 Day, 444; *Jacob v. United States*, Brock, 520.

Repeated decisions of the Federal courts show that debt will lie to recover a penalty, as provided in § 89 of the principal Collection Act, and that the same form of action is an appropriate remedy to recover unpaid duties in cases where goods from a foreign country have been imported without their payment and without giving security as provided by law. Authorities may doubtless be cited in which it is held that *indebitatus assumpsit* will lie for duties, but it is well settled in this court that debt also will lie, which is all that need be affirmed at the present time. *United States v. Lyman*, 1 Mas. 482; *United States v. Howland*, 2 Cran. C. C. 508.

Objections to the form of the remedy are clearly not well founded, and it is equally clear that the objections to the joinder of the counts must also be overruled, as the law is well settled that whenever the same plea may be pleaded and the same judg

ment given on two counts, they may be joined in the same declaration; and the fact that the duties are to be paid in gold is not sufficient to take the case out of the operation of that rule of pleading, as that matter is regulated by statute. *Brown v. Dickson*, 1 Term, 276; *Cheang Kee v. United States*, 3 Wall. 320; 13 Stat. at Large, 494, § 13; 12 Stat. at Large, 345.

Recovery both for the duties and the double values, it is suggested, cannot be had in the same case where the owner was the importer, but it is not perceived that the objection is entitled to any weight, and the defendants do not refer to any decided cases which give it any support. Import duties are levied by act of Congress, and when the goods are imported without paying or accounting for the same, the action against the importer is founded upon a statute liability which becomes complete as soon as the goods are illegally imported. Goods illegally imported are forfeited and liable to seizure, and whoever "receives, conceals, or buys such goods shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods." Owners, it is said, cannot "buy" their own goods, but they may receive or conceal goods belonging to their firm, or to themselves as individuals, which have been illegally imported, and which are forfeited and liable to seizure and condemnation. Suits to recover double values are founded on acts wholly distinct from the act of importation, and the owner, consignee, or agent may be liable both for the duties, because the goods were imported without their payment and without giving security for the same, and also for the subsequent reception and concealment of the same, so that they cannot be seized and libelled as forfeited for a violation of the revenue laws. Counts joined for such distinct liabilities are not inconsistent, because they are founded upon distinct acts of the defendants, which if proved render them liable both for the described penalty and for the duties.

Exceptions were taken to the rulings and instructions of the court, which must also be re-examined. Prior to the institution of the suit, the district judge issued a search-warrant under § 2 of the act of the 2d of March, 1867, directed to the marshal, requiring him to enter, in the daytime, the store of

the defendant's firm situated in Bangor, and there to search for such day-books, journals, etc. as are therein described; and the action of the marshal shows that he, in obedience to the precept, entered the store, in the daytime, and there found, took, and carried away certain books, papers, letters, etc., as therein directed, and that he "brought them before the district judge as therein directed."

Account-books, letters, copies of letters, and other documents so seized by the marshal and brought before the district judge, were by him placed in the custody of the district attorney for his official examination. Such account-books, letters, copies of letters, and other documents being so in the custody of the district attorney, he offered the same in evidence as tending to prove that the plaintiffs were entitled to recover.

Two objections were taken by the defendants, at the trial, to the admissibility of the books, papers, and documents as offered in evidence:—

1. That the court was not authorized to issue nor the marshal to execute the warrant in question.

2. That the district attorney could not, if objected to by the defendants, put in evidence against them papers from his own possession, obtained and placed there by force of the warrant.

Power to issue such a warrant is vested in the district judge whenever it shall be made to appear by complaint and affidavit to his satisfaction that any fraud on the revenue has been committed by any person interested or engaged in the importation or entry of merchandise at any port within such district; and the provision is, that the warrant shall be directed to the marshal, requiring him to enter any place or premises where any invoices, books, or papers are deposited relating to the merchandise in respect to which such fraud is alleged to have been committed, and take possession of such books and papers and produce them before the said judge. 14 Stat. at Large, 547, § 2.

Unreasonable searches and seizures are forbidden by the Constitution, and the act of Congress provides "that no warrant for such seizure shall be issued unless the complainant shall set forth the character of the fraud alleged, the nature of the same, and



the importations in respect to which it was committed, and the papers to be seized."

Warrants of the kind, it is conceded, may be authorized by Congress, to search for articles used in the commission of crime, or for stolen goods where the crime charged is within Federal jurisdiction ; but it is insisted that warrants for search and seizure except in cases of alleged crime, are not allowed by existing laws.

Objection is also taken to the sufficiency of the warrant upon several grounds: first, because it is not accompanied by any complaint or affidavit, and the proposition is that the act of Congress makes the existence of a complaint of the described character essential to its validity ; second, that even if the recitals in the warrant may dispense with the production of the complaint, still the recitals in that behalf, in this warrant, are not sufficient, because the facts recited therein do not amount to a fraud ; third, that the description of the importations in respect to which the alleged fraud was committed is bad because it is not sufficiently specific and definite. Contradicted as the first proposition is by the express language of the section under which the warrant in this case was issued, it does not seem to be necessary to give the proposition any very extended examination. Full power and authority were given to collectors, naval officers, and surveyors, or other persons specially appointed by either of them for that purpose, by the act of the 31st of July, 1789, to enter any ship or vessel, in certain cases, and therein to search for, seize, and secure any goods subject to duty, therein concealed ; and if they had cause to suspect a concealment thereof in any particular dwelling-house, store, building, or other place, they or either of them might, upon application on oath to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the daytime only), and there to search for such goods, and if any were found to seize and secure the same for trial. 1 Stat. at Large, 43. Revenue-officers were also authorized, by the act of the 18th of August, 1793, to go "on board of any ship or vessel, . . . and the same to inspect, search, and examine," and if it appeared that any breach of the revenue laws had been committed whereby such ship or vessel or the

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goods on board were liable to forfeiture, to make seizure of the same. 1 Stat. at Large, 315.

Authority to secure such warrants upon proper application, on oath, to any justice of the peace, and to make such searches and seizures as was conferred by the first Collection Act, was continued by the act of the 4th of August, 1790, as appears by § 48 of that act. 1 Stat. at Large, 170. All the prior laws passed to regulate the collection of duties on imports and tonnage were revised on the 2d of March, 1799, and some of the antecedent regulations were essentially modified; but the provision which authorized collectors, naval officers, and surveyors, and such other persons as either of them might specially appoint, to procure a search-warrant to search for, seize, and secure for trial goods subject to duty, where a concealment thereof was suspected, was re-enacted therein in the same words in which it appears in the two prior acts of Congress upon that subject. 1 Stat. at Large, 677. District judges were first authorized to issue such search-warrants by § 7 of the act of the 3d of March, 1863, but they were required by that act to direct the warrant to the collector of the port where the alleged frauds were committed. 12 Stat. at Large, 740. Service of the warrant under that act was to be made by the collector as under the prior acts, when he was the applicant for the same, but the act under which this warrant was issued provides that the warrant shall be directed to the marshal of the district. 14 Stat. at Large, 545, § 2. Search-warrants, therefore, if in due form, are authorized in such cases by an act of Congress, on the condition and for the purposes specified in the provisions to which reference has been made. Congress may "lay and collect taxes, duties, imports, and excises," and may also "make all laws which shall be necessary and proper for carrying into effect" that express grant of power.

Experience everywhere shows that import duties cannot be successfully levied and collected without laws establishing regulations upon the subject, requiring their payment or security for the payment of the same, at the time the goods are imported, and before they are unladen and delivered. Regulations only are not sufficient, nor are prohibitions merely, but both must be en-

forced by legal sanctions. Important regulations upon the subject were adopted by the first Congress at the time they created and organized our revenue system, and provision was then made for punishing their violation by fine, penalty, and forfeiture, according to the nature of the prohibited act, and as directed in the act of Congress. Penalties accruing by the breach of the act, were to be sued for and recovered with costs of suit, in the name of the United States, by the collector of the district where the same accrued, unless in cases of penalty relating to an officer of the customs. 1 Stat. at Large, 47. Power to pass such laws and to prescribe the form of the proceeding for their enforcement, whether by indictment, information, debt, or action on the case, was never questioned, and any argument to support the right of Congress to pass such laws would seem to be unnecessary, as it is clear they are requisite and proper to enable Congress to carry into effect the express grant to lay and collect taxes, duties, imports, and excises. Warrants to search dwelling-houses, stores, buildings, and other places for concealed goods alleged to have been illegally imported, and for the seizure of the goods for trial, have been allowed by law from the organization of the revenue system to the present time, and it is not perceived that any greater objection can be taken to a warrant to search for books, invoices, and other papers appertaining to an illegal importation than to one authorizing such a search for the imported goods. Such warrants might be procured, until within a recent period, upon application to a justice of the peace, and the same might be served by the collector, naval officer; or surveyor, by whichever the application was made, and to which the warrant was granted. 1 Stat. at Large, 43; Ibid. 678. Abuses occurred under those laws, and Congress wisely repealed the provisions authorizing justices of the peace to grant such warrants, and vested the power in judges of the District Courts, and has finally provided that the warrant shall be directed to the marshal of the district for service. 12 Stat. at Large, 740; 14 Stat. at Large, 547.

Guarded as the new provision is, it is scarcely possible that the citizen can have any just ground of complaint, as the condition

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precedent to the granting of the warrant is that it shall be made to appear to the satisfaction of the judge of the District Court by complaint and affidavit, that a fraud on the revenue has been committed by some person or persons interested, or in some way engaged in the importation or entry of merchandise at some port within such district. His act in granting the warrant is a judicial act, as he hears the applicant, and if satisfied, among other things, that such a fraud on the revenue has been committed, he will grant the warrant, and if not so satisfied, the application will be refused. Attempt is made in argument to limit the power to authorize such warrants to criminal cases, but the proposition finds no support in the acts of Congress, nor in any decision of the Federal courts. Individuals cannot sue out or employ such a process in the course of civil proceedings, or for the maintenance of a mere private right, and where the judges of insolvency in Massachusetts were empowered by an act of the legislature to grant search-warrants on the application of the assignees to search for the property and books of the debtor, the Supreme Court of the State held that the act was unconstitutional and void, as the process was to be used exclusively in mere civil proceedings, where nothing but a personal claim or the right to prosecute a private suit was involved. *Robinson et al. v. Richardson*, 13 Gray, 454. Private parties, it is conceded, may not employ the writ as the means of prosecuting a private right, but it cannot be admitted that Congress, in providing means to prevent, detect, and punish frauds upon the public revenue, is forbidden to authorize the use of such a process merely because the penalty imposed on the person violating the law and perpetrating the fraud, may be recovered otherwise than by indictment.

Debt undoubtedly is the proper remedy in the present case; but Congress may enact that the penalty imposed for receiving, concealing, or purchasing goods illegally imported shall be recovered by indictment or debt at the election of the prosecutor. Suffice it to say, that the acts charged in the declaration were unlawful acts, declared to be such for the prevention of fraud and for the protection of the public revenue, and as such the acts charged were public wrongs, which subjected the perpetrators to the

penalty provided by law, and it is as clearly competent for Congress to authorize the district judges to issue a warrant in such a case to search for and seize the invoices, books, and papers evidencing such a fraud, as it would be for a State magistrate to grant a warrant to search for and seize stolen goods. Much jealousy existed against general warrants before and at the time the Constitution was adopted, and the fourth amendment provides that "no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized"; but the provision affords no support to the limitation expressed in the proposition of the defendants. *Entick v. Carrington*, 2 Wils. 275; *Cooley on Con.* 299; *Sanford v. Nichols*, 13 Mass. 286; *Bostock v. Saunders et als.*, 3 Wils. 434; Same Case, 19 How. St. Tr. 1030; *Reg. v. Mosely*, 1 Car. & Kirw. 711. Writs of assistance, also, as granted by the courts to revenue-officers in the last century, empowering such officers, at their discretion, to search suspected places for smuggled goods, were justly regarded with great disfavor as facile instruments of arbitrary power; but the warrant for search and seizure as authorized by the present act of Congress to be issued by the district judges, is not properly subject to any of the objections which were made to those unguarded discretionary licenses to subvert the principles of civil liberty. *Paxton's Case*, Quincy R. 51; *Cooley on Con.* 301.

Such a warrant cannot be issued under the act of Congress unless it is made to appear by complaint and affidavit to the satisfaction of the judge of the District Court that a fraud on the revenue has been committed, nor unless "the complainants shall set forth the character of the fraud alleged and the nature of the same," describing also the importations and the papers to be seized. Search-warrants for any purpose are doubtless obnoxious to very serious objections, and it is necessary in every case that the warrant shall particularly specify the place to be searched and the person or object to be seized, as it is clear that general warrants are forbidden by the fourth amendment of the Constitution. Judges of the District Courts have no authority to issue

such warrants unless they are directed to the marshal of the district, and the law requires that the warrant shall describe the invoices, books, or papers for which the search is to be made, and the place or premises where they are deposited, and the direction to the marshal must be to enter the described place or premises where the invoices, books, or papers are deposited, and to take possession of the same and produce them before the said judge. When the warrant is so framed as to constitute a compliance with the conditions expressed in that section of the act of Congress, the court is of the opinion that it may be properly issued by the district judge and that it may lawfully be served by the marshal of the district.

Certain formal objections are also taken to the warrant, which will be briefly considered. 1. When the account-books, letters, and documents were offered in evidence, the defendants objected to their admissibility because they were obtained from their possession by force of the search-warrant exhibited in the record, and it is insisted in argument that the ruling of the district judge in admitting them in evidence was erroneous, because the warrant is not accompanied by any complaint or affidavit; but the court is of the opinion that the introduction of the complaint and affidavit is not necessary in a case where they are referred to in the warrant, and it appears by the recitals of the same that it was shown by complaint and affidavit to the satisfaction of the district judge that the alleged frauds on the revenue had been committed as therein set forth.

Objection is also made to the warrant that the alleged frauds are not therein described with sufficient particularity; but the court is of a different opinion, as it clearly appears from the recitals of the warrant that the defendants at the times therein alleged did commit frauds on the revenue by importing large quantities of shingles subject by law to duty, into the port of Bangor and other ports in that district without paying or accounting for the duties. In argument, the defendants allege that the acts charged, as described in the warrant, do not amount to a fraud because the shingles imported were the "growth and manufacture" of the adjacent Provinces, and they insist that such

shingles were not by law subject to duty ; but the court is not able to sustain that theory for the reasons already explained, and the objection must be overruled.

They also insist that the importations were not described in the warrant with sufficient certainty ; but they are described as shingles, and as shingles are enumerated in the treasury regulations as an article subject to duty under the Reciprocity Treaty, and as it is a matter of common knowledge that they are manufactured of wood, the court is of the opinion that the description is sufficient. Although the warrant is not defective in either of the particulars mentioned, still it does not allege that the district judge became satisfied by complaint as well as by affidavit that the alleged frauds on the revenue had been committed, and in that respect it fails to comply with the act of Congress. Substantial compliance with the conditions specified in the section conferring the power is essential to the validity of the warrant, but the court is of the opinion that the defect will not avail the defendants in this case for two reasons : first, because they did not except at the trial to the ruling of the court admitting the books, letters, and documents in evidence, upon that ground ; second, because the books, letters, and documents were properly admitted in evidence, even if the search-warrant was illegal.

Exceptions to the ruling of the court in admitting evidence should be sufficiently specific to enable the court to understand the precise grounds of the objections to its admissibility, and unless they are so they cannot be regarded as the proper foundations for a writ of error to reverse the judgment. Evidence may be inadmissible because it is immaterial, or because it is secondary in its nature, or because better evidence exists, or because it is defective in some legal requirement, or because it is oral and not in writing, or because it is offered to vary or contradict what is in writing, and in some cases because it was improperly obtained ; but whenever objections to the admissibility of evidence are special in their nature and not apparent, they should be specifically stated, that the opposite party may be apprised of their real character and that the presiding justice may not be led into error. *Harvey v. Tyler*, 2 Wall. 328 ; *Rogers v. Marshall*, 1 Wall.



644. Appellate courts are necessarily confined to the record, and all that appears in this case is, that the defendants, when the books, letters, and documents were offered in evidence, objected that the court was not authorized to issue, nor the marshal to serve, the warrant in question, and that the district attorney could not put the papers in evidence, as they had been obtained and placed in his possession by that warrant. Authority to issue the warrant was by law vested in the district judge, and inasmuch as the judge in issuing it exercised a judicial discretion, no doubt is entertained that the warrant, though defective in form, was sufficient for the protection of the marshal. Suppose, however, that the exception is sufficient, and that the search-warrant was illegal, still the court is of the opinion that the books, letters, and documents were properly admitted in evidence, as they were pertinent to the issue and were offered in evidence in the same condition in which they were when they came from the possession of the defendants without mutilation or alteration. *Com. v. Dana*, 2 Met. 329; *Legatt v. Tollervey*, 14 East. 302; *Jordan & Lewis*, 14 East. 306 note.

Lottery tickets, in the case first mentioned, had been seized under a search-warrant, and the person in whose possession they were found had been indicted as having them in his possession with intent to sell the same in violation of law. Service was made, and the accused went to trial, and the prosecuting officer offered the lottery tickets as evidence, and they were objected to as inadmissible by the defendant, as having been improperly obtained by the use of an illegal search-warrant; but the Supreme Court of Massachusetts held that where papers are offered in evidence the court can take no notice how they were obtained, whether lawfully or unlawfully, nor will the court form a collateral issue to determine that question. Judge Story laid down the same rule twenty years before in the case of *The Eugenie*, 2 Mas. 441, and the rule there established has never been questioned in this Circuit. Illustration to show what is meant may be drawn from the rules applied to confessions in criminal cases. Confessions obtained by threats or promises are never admitted in evidence against the accused, but if he at the

same time exhibits the implements with which he committed the crime, or the stolen goods, or in case of murder if the accused exhibits the money or the effects of the deceased, they are admissible, because, being facts, they cannot be changed by the threats or promises. *King v. Warrickshall*, 1 Leach Cr. Cas. 268; *Com. v. Knapp*, 9 Pick. 511; 1 Greenl. Ev. §§ 231, 232. Although a confession obtained by means of promises or threats cannot be received, yet if in consequence of that confession certain facts tending to establish the guilt of the prisoner are made known, evidence of those facts may be received. Ros. Crim. Ev. 51; 1 Phil. Ev. (ed. 1869) 524. Viewed in either light, the objection is not well founded and must be overruled.

The next objection is, that the district judge could not put the papers so seized and brought before him into the possession of the district attorney to be used as evidence in the case; but the court is of a different opinion, as the very object of the search is to ascertain whether there are such papers deposited in the described place or premises, and if so that they may be seized and "produced before the said judge." Papers so seized are declared by the act of Congress to be "subject to the order of said judge," but he must allow the examination of the same by the Collector of Customs or by any officer duly authorized by the collector for that purpose. Invoices, books, or papers so seized may be retained by said judge as long as in his opinion the retention thereof is necessary, and the court is of the opinion that invoices, books, or papers so seized, like the implements of crime or stolen goods seized on search-warrants, may in a proper case be given in evidence against the offender and perpetrator of the fraud. *Com. v. Dana*, 2 Met. 329. Suits in the name of the United States are instituted in the Circuit and District Courts by the district attorneys, and while pending there such suits are controlled by those officers under the instructions of the Attorney-General. They are the proper officers to institute proceedings to recover such penalties as those incurred in this case, and when such a suit is pending and comes on for trial, the district attorney may well claim the right to use all legal evidence at command, whether the same is in the archives of the government

or on file in the court. Confiscation Cases, 7 Wall. 456. The defendants also object that the books, letters, and documents are not by themselves legal testimony, but the decisive answer to objection is, that the burden to show error is upon the party alleging it, and inasmuch as the books, papers, and documents in question are not set forth in the bill of exceptions, nor in any way made a part of it, the presumption is that the ruling was correct and the point is not open for re-examination. Before the taking of the deposition of Thomas Dowling was taken by the United States under a commission, and when it was offered in evidence the defendants objected to the admissibility of the same, because they alleged, the return does not show that the commission was duly executed. They took three objections to the sufficiency of the return: 1. That it does not appear by it that the magistrate himself examined the defendant. 2. That it does not appear by it that he reduced, or caused to be reduced, to writing the deponent's answer. 3. That it does not appear by it that he reduced the answers of the deponent to writing, or caused them to be reduced in his presence. These objections were overruled, and the deposition was admitted subject to exceptions.

Erroneous in fact as the first objection is, it is only necessary to refer to the statement made in the return for its correction where it is stated that "an examination on oath of the deponent was had and taken before me," which certainly is a substantial compliance with the directions of the commission. Interrogatories and cross-interrogatories accompanied the commission, and the return is, that "the following are the answers" of the deponent given to the several interrogatories and cross-interrogatories thereto annexed, and in conclusion the return states "that the signatures of the deponent affixed to this deposition are in his handwriting and made in my presence." Depositions *de bene* may be reduced to writing by the deponent as well as by the magistrate, and the court is not induced to give the commission in the case a construction which would prohibit the magistrate from granting that privilege to the deponent if exercised in his presence. 1 Stat. at Large, 89. Directed as the magistrate was to permit no person other than a clerk to be present dur-

the examination, except the deponent and himself, and as it does not appear that any clerk was appointed by the magistrate, the presumption is that no other person than the deponent and the magistrate was present at the examination; and, if not, then it must be presumed that the answers were reduced to writing either by the deponent or magistrate, and, if by either, then it is clear that the second objection cannot be sustained. Answers were given by the deponent to the several interrogatories and cross-interrogatories annexed to the commission in an examination, on oath, before the magistrate, and the return states that the signatures affixed to the deposition are in the handwriting of the deponent, and that they were made in the presence of the magistrate, which is all that need be said in reply to the third objection. Examination of the exceptions to the instructions of the court must also be made, which involves the necessity of further reference to the facts in the case as reported.

By the bill of exceptions it appears that the firm of D. R. Stockwell & Co., consisting of Davis R. Stockwell, John S. Cutler, and George S. Chalmers, who was not sued, had long been engaged at Bangor in the lumber business; that the senior partner in 1863 proposed to the partners that the firm should engage with Leeman Stockwell in the shingle business, in which he had large experience, and the arrangement as proposed was accepted to the effect that Leeman should transact the business in the name of the firm, and give it his entire attention; that the firm should furnish the capital, and that the profits or loss should be divided, one half to the person transacting the business, and the other half to the firm, which furnished the capital. Pursuant to that arrangement, Leeman Stockwell engaged in the business during the years 1863 and 1864, collecting and buying shingles on the St. John's River, and in forwarding the same to Bangor, consigned to the firm of the defendants; and the bill of exceptions also shows that a separate account of the business was kept by the firm, and that the account at the end of each year was closed by the division of the profits as agreed in the arrangement. Evidence was introduced by the plaintiffs tending to show that the shingles in question were the growth and produce of the

adjacent Province, and that the defendants had actual knowledge that such was the fact. Opposing testimony was introduced by the defendants, but the jury returned their verdict in favor of the plaintiffs. During the period the active partner in the business employed an agent, and when the cargoes came to Bangor they were reported at the Custom House with the manifest and foreign clearance, together with the certificate of the agent and two merchants, or the affidavit of the agent, to their American origin; and the collector required no duties on the cargoes, and no entries were made, nor were any invoices or bills of lading produced to the collector. They were openly in the possession of the firm without any attempt at concealment, were throughout, in fact to the commencement of the suit, treated by all parties as not being subject to duty. Whether the witnesses were entitled to credit or not was left to the jury, but, taking the arrangement to have been as described in the bill of exceptions, the jury was instructed that if Leeman Stockwell in the conduct and management of the business so intrusted to him, and in the course of the business, and for the common and joint benefit of himself and that firm, went into New Brunswick, and there knowingly purchased and received, on their joint account, shaved shingles, the growth and produce of that Province, and that he afterwards, by himself or his agents, knowingly sent such shingles to his copartners at Bangor, fraudulently documenting them as the growth and produce of Maine, so that the shingles in the regular course of business should thereby be, and were, admitted and received into the United States by the defendants as the growth of Maine, the shingles so imported were illegally imported, and were liable to seizure; and that the defendants, being his partners, were in this action chargeable with and bound by the knowledge which he possessed, if he did possess it, that the shingles were the growth and produce of that Province, and as such were liable to duty, and that the shingles were liable to seizure because they were illegally imported.

They were also told that the action being a civil action, and not a criminal prosecution, the knowledge of one of the firm touching the matters involved in this suit is to be deemed the

knowledge of all the defendants, his copartners, in the shingle business. That if Leeman Stockwell as a member of the firm, being so engaged in the shingle business, at the time of the importation and reception of the shingles at Bangor, knew that they were Province shingles, subject to duty and liable to seizure, and that they were illegally imported, it is not necessary for the government to prove that the several defendants personally had actual knowledge of those facts which were then within the knowledge of their partner who transacted the business.

That if with that knowledge so possessed by Leeman Stockwell, that the shingles were illegally imported and liable to seizure, the defendants in the usual course of the business received the shingles at Bangor and they were disposed of by them, and the profits were divided agreeably to the arrangement, the jury were authorized to find that the defendants, being partners of the said Leeman, received the shingles, knowing that the same were illegally imported and that they were liable to seizure. Remarks beyond those already made to show that the shingles were illegally imported and liable to seizure are unnecessary, as that has been made to appear to the entire satisfaction of the court, nor is it worth while to occupy much time in proving that the firm of the defendants as it existed prior to the arrangement was a partner with Leeman Stockwell in the shingle business, as that is conceded by the defendants in their printed argument. Partnership is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some one or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits between the respective parties. Actual participation in the profits as principal is, in general, sufficient to create a partnership, as between the parties and third persons, but the express agreement in this case was that the defendants should participate both in the profits and loss, and as they furnished the capital and have settled the accounts and carried the agreement into full effect, the nature of this transaction is placed beyond doubt. *Berthold et al. v. Goldsmith*, 24 How. 541; *Denny et al. v. Cabot et al.*, 6 Met. 90.

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Argument to show that Leeman Stockwell had knowledge of the alleged frauds is quite unnecessary, as it appears that he made the purchases, shipped the shingles, gave or procured the affidavits and certificates containing the false statements, which deceived the revenue officers and induced them to allow the shingles to be unladen and delivered without entry or permit, and without paying or accounting for the duties. Such being the state of the case, nothing remains for re-examination except to inquire and determine whether the defendants are chargeable with the knowledge possessed by their partner and agent who transacted the business.

All the shingles were consigned to them under the arrangement, and they made the sales, received the purchase-money, and when the accounts were adjusted, one half of the amount was paid over to the perpetrator of the frauds and the other half was absorbed in their general business. Torts may arise in the course of the business of the partnership, says Judge Story, for which all the members of the firm will be liable, although the act may not in fact have been assented to by all the partners. Thus, for example, if one of the partners should commit a fraud in the course of the partnership business, all the partners may be liable therefor, although they may not all have been concerned in the fraudulent act. *Castle et al. v. Bullard*, 23 How. 188. Story on Part. § 165; Collier on Part. §§ 445, 447. When one assuming to be an agent had committed a fraud in a sale, it was held, in *Taylor v. Green*, 8 Car. & P. 316, that the mere adoption of the sale and the receipt of the money by the person for whom the sale was made rendered him liable for the fraud.

Decided cases of like import are quite numerous, and some of them were made at a very early period. *Attorney-General v. Stannyforth et al.*, Bunbury R. 97. Treble value of goods was recoverable at that time if the goods were imported, knowing that the duties had not been paid, and yet the court held, in the case of *Attorney-General v. Burges*, Bunbury R. 223, that if several persons were concerned, either as partners or otherwise, the Crown might proceed against any one of them for the whole penalty, it being in the nature of a tort, and not a contract, and that there was



no necessity to prove that the goods actually went into the hands of the party sued, that it was sufficient if they came into his power or into the custody of his agent or of any person by his direction. Partners constitute, as such, but one person in law, and the act of one in the business which constitutes the subject-matter of the partnership is *civiliter* the act of all. *McFarland v. Crary*, 8 Cow. 258; *Peck et al. v. Fisher*, 7 Cush. 386; Story on Agency, § 452; Smith on M. & S. 151; *Doe v. Martin*, 4 Term. 66. Most of these cases rest upon the doctrine, which is clearly applicable in this case, that it does not lie with one to claim property or the avails of it through the fraudulent act of another without being affected by that act, especially if he was his partner, the same as if it were his own, and the court is of the opinion that the defendants, inasmuch as they have received the fruits of the fraud, are liable to the penalties annexed to their commission. *Olmsted v. Hotailing*, 1 Hill, 318; *Stockton v. Frey*, 4 Gill. 406. Partners are liable *in solido* for the tort of one of their number, if that tort were committed by him as partner, and in the course of the partnership business. *Lock v. Stearns*, 1 Met. 560; *National Exchange Co. v. Drew*, 32 Eng. L. & Eq. 1. Recent decisions in England have adopted these principles in their widest extent, and applied them in revenue cases. *Attorney-General v. Riddle*, 2 Crompt. & Jer. 493; *Attorney-General v. Siddon*, 1 Crompt. & Jer. 220. Examined in any point of view, it is clear that there is no error in the record, and the judgment is affirmed with costs.

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The United States v. Sixty-Four Barrels of Distilled Spirits.

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## MASSACHUSETTS DISTRICT.

OCTOBER TERM, 1870.

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THE UNITED STATES v. SIXTY-FOUR BARRELS OF DISTILLED SPIRITS,  
JOHN E. CASSIDY, Claimant.

A purchaser of distilled spirits, ignorant at the time of the purchase that the spirits had been fraudulently removed from a bonded warehouse, or that the tax imposed thereon had not been paid, acquires his title only by such purchase, and if the property in the spirits claimed by the vendor had been absolutely forfeited to the United States before the sale, then the vendee can acquire no title; but where the verdict of the jury had established the fact of the innocence of the purchaser and claimant, the question is whether the goods had been forfeited to the United States before the contract of sale. The liability of the goods to forfeiture in such case must be deduced from the acts of the first owner and seller alone.

Forfeitures made absolute by statute relate back to the time of the commission of the wrongful acts prohibited by statute, and the title vests immediately in the government on the commission of the wrongful acts.

But where there is more than one remedy provided by statute, and the government has an election to proceed for the forfeiture or in some other way not involving a forfeiture, the title to the property does not vest in the United States prior to the seizure or performance of some act which amounts to such election.

Congress has the power to decide in what event a divestiture of title shall take place, and where the act declares without any election of remedies that forfeiture shall take place upon the commission of the wrongful act, the court must carry the provision into effect, even against innocent purchasers, where the title is consummated by seizure, suit, judgment, and condemnation.

Where the language is doubtful, resort must be had to the ordinary rules of construction, and the rules of the common law applicable to the subject of forfeiture.

The title of the wrong-doer remains unaffected by his wrongful acts until suit, seizure, and judgment or decree, but where the act of Congress so provides, and there is no election of remedies, the judgment or decree divests his title from the date of the wrongful acts.

§ 45 of the act of July 13, 1866, provides that "all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid, shall be forfeited to the United States, or may immediately upon discovery be seized, and after the assessment of the tax thereon be sold by the collector for the tax and expenses of seizure and sale."

*Held*, that under this statute the judgment or decree only relates back to the date of the seizure, and does not overreach the title of an innocent purchaser acquired subsequent to the date of the wrongful acts and before the seizure.

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**PROVISION** is made by § 45 of the act of July 13, 1866, that "all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid, shall be forfeited to the United States, or may immediately upon discovery be seized, and after the assessment of the tax thereon be sold by the collector for the tax and expenses of seizure and sale." 14 Stat. at Large, 163. Pursuant to that enactment, the libellant alleged, in the first count of the information, that the internal-revenue collector for the third collection district in this State on April 26, 1867, did, at Boston, in this judicial district, seize on land, as forfeited to the United States, sixty-four barrels of distilled spirits found on the 28th of April in the same year in a certain store and building therein described. And the libellant further alleged that the goods so seized were distilled spirits; that they had been manufactured in the United States since January 1, 1865; that an internal-revenue tax was, and since the goods were so manufactured had been, by law imposed on the same; that the goods so seized in the store and building aforesaid were found elsewhere than in a bonded warehouse; that they had not been removed from any bonded warehouse according to law; and that the tax so imposed by law on the same had not been paid, nor any part of the same, when the goods were so found and seized.

Two other counts were also contained in the information, founded on another provision enacted by Congress. 14 Stat. at Large, 111; 13 Stat. at Large, 240. This provision reads as follows: **That** goods on which taxes are imposed by law if "found in the possession or custody or within the control of any person or persons for the purpose of being sold or removed by such person or persons in fraud of the internal-revenue laws, or with [the] design to avoid [the] payment of said taxes, may be seized by the collector, . . . and the same shall be forfeited to the United States." When the information was filed it contained four counts, but the fourth was discontinued, and a new one was filed in its place by leave of court, which was the fourth count in the series as at present numbered.

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Omitting unimportant words, the last three counts alleged in substance and effect, that the goods in question were distilled spirits manufactured in the United States; that on the day and year aforesaid they were found by the said collector in the store and building aforesaid; that the goods were then and there within the control of the claimant for the purpose then and there entertained by him, of being sold and removed in fraud of the internal-revenue laws of the United States, and with the design of avoiding the payment of the taxes imposed on the same, which then and there remained due and wholly unpaid.

Monition was duly issued and served, and the claimant appeared, and alleged, in due form, that he, at the time of the seizure, was and still was the lawful and sole owner and proprietor of the goods seized, of which he offered due proof. Two pleas were subsequently pleaded by the claimant: 1. That the goods in question did not, nor did any part thereof, become forfeited to the United States in manner and form as in said information was alleged. 2. That the sixty-four barrels of distilled spirits did not become forfeited, as alleged, because the same after their manufacture had been in a bonded warehouse, and that the same had been removed from that depository in due form of law; that after the same were so removed from the bonded warehouse, they were rectified and inspected by a government inspector, and were duly marked as required by law; and that the same were subsequently offered for sale in open market; and that he, without any knowledge, information, or belief that the same were not properly and rightfully so offered for sale, or that there was any tax due and unpaid to the United States upon the same, bought the said sixty-four barrels of distilled spirits and paid for the same their full, just, and marketable value; all of which, as he alleged, he was ready to verify. Issue was joined upon the first plea, and to the second the libellant filed a general replication, affirming that all the allegations of the information were true, and tendering an issue which was duly joined by the claimant. Both pleas therefore terminated in issues of fact, and the jury under the instruction of the court returned a verdict for the claimant. Exceptions were tendered by the district attorney, and the same were duly

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allowed and sealed, and the questions examined and decided were those saved in the bill of exceptions, and brought into the court by the writ of error sued out by the United States.

Evidence was introduced tending to show that several hundred barrels of distilled spirits manufactured within the United States were deposited in certain bonded warehouses in the third internal-revenue collection district in this State; that a tax was imposed on the same under the internal-revenue laws of the United States which had not been paid; that the same were withdrawn from that depository upon application made in due form to the collector of that collection district, the applicants giving bonds in due form for the alleged purpose, in certain cases that the spirits were withdrawn for rectification, and in other cases that the spirits were withdrawn for the purpose of transportation to some port or place in another State, and for exportation from thence to some foreign country. None of the applications, however, were made by the claimant, nor did he execute any of the bonds or cause them to be executed, but the bonds were accepted by the collector, and he granted permits in due form, as in case of withdrawal for rectification or for transportation to another State. All of the bonds were false and fraudulent, and none of the spirits were ever returned as stipulated, nor were the same or any part thereof ever transported to another State or to any foreign country. On the contrary, the spirits were removed and sold for consumption within the United States, and barrels filled with water were attempted to be transported in their place, and all the spirits were consumed in this country without paying the taxes, in violation of the internal-revenue laws passed by Congress. Such of the spirits as were in controversy in this case were found by the collector in the store and building described in the information. They were in the actual possession of other parties, but the bill of exceptions showed that they had been placed there by the direction of the claimant, were under his control, and were intended to be sold and removed, and that the building was neither a bonded warehouse nor a distillery. Some evidence was also introduced tending to show that the spirits in question were

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a portion of the spirits fraudulently withdrawn from the bonded warehouses as aforesaid, and that the claimant received the same from one of the persons who executed the false and fraudulent bonds, or procured them to be executed, and that the claimant not only knew that the spirits had been thus fraudulently removed from the public depositories, and that the taxes had not been paid thereon, but that he participated in the fraudulent acts by which the removal was effected, and also in the fraudulent attempt to transport water instead of the spirits to another State, and that he held the spirits in possession for the purpose of removal and sale. All such participation and knowledge were denied by the claimant, and he introduced evidence tending to show that he purchased the spirits innocently, and for value and in good faith, at their full market value, that he had no knowledge that the spirits had been fraudulently withdrawn from the bonded warehouses, or that the taxes had not been paid. Rebutting evidence was introduced by the libellant as to the market value of the spirits, and the bill of exceptions shows that the claimant admitted that the price paid, the spirits being greatly above proof, was less per gallon than the tax imposed and unpaid. Two instructions were given by the court to the jury at the request of the claimant, to which the district attorney excepted: —

That if the spirits were removed from a bonded warehouse upon bonds in the form prescribed by law, then the facts that such bonds were signed by irresponsible parties, and that the same was known by the party who withdrew the spirits and intended to commit the fraud, do not render the spirits liable to forfeiture in the hands of an innocent purchaser. That if the spirits were fraudulently withdrawn as aforesaid, but in the form prescribed by law, and the claimant was not a participant in the fraud, and purchased the spirits in good faith without knowledge of the fraud, then he acquired a good title, and the spirits cannot be forfeited. Prayers for instructions were also presented by the district attorney in substance and effect as follows:

That if the spirits were found elsewhere than in a bonded warehouse, and not in a distillery, and had been removed from such a

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depository upon permits authorizing the removal for rectification or for transportation, issued upon the execution of false and fraudulent bonds, in form such as were required by law, and if the tax imposed on the spirits had not been paid, then the spirits are subject to forfeiture under the first count, even though the claimant may have purchased the same innocently and without any participation or guilty knowledge of the fraudulent removal or that the tax had not been paid. That the spirits having been found as shown in the evidence, the burden is upon the claimant to satisfy the jury that the tax imposed by law on the same had been paid, and that if he fails so to do, the verdict on the first count must be for the United States. That if the claimant purchased the spirits at a less price than the tax as imposed by law, and if the spirits had actually been fraudulently removed from a bonded warehouse as aforesaid, and if the tax imposed by law thereon had not been paid, then the said spirits were subject to forfeiture under the first count in the information. That if the claimant purchased the spirits at less price than the tax imposed by law thereon, the fact of such purchase under such circumstances "must be in law taken" as notice that the spirits had not been removed from a bonded warehouse according to law, and that the tax imposed thereon had not been paid, if in fact the spirits had been fraudulently removed from such a depository as aforesaid, and if in fact the tax imposed by law on said spirits had not been paid.

• The court refused to give the instructions as requested, and instructed the jury, among other things, in substance and effect as follows: That if the spirits were fraudulently removed from the bonded warehouse, as aforesaid, for the alleged purposes aforesaid, but were really withdrawn for sale and consumption, and if the tax imposed by law on such spirits had not been paid, the spirits would be liable to forfeiture under the first count in the hands of the person who committed the fraud, or of any person who aided in committing it or connived at it, or of any purchaser who held the spirits for sale and consumption, and who bought the same with actual knowledge of the fraud. Just exception, it was conceded, could not be taken to that part of the charge, but the court in the same connection instructed the



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jury that the spirits under the circumstances therein assumed would not be liable to forfeiture if in the hands of an innocent purchaser for value without notice. Certain instructions were also given by the court as to the burden of proof, but as those rulings were not the subject of complaint, the instructions are omitted. That the purchase of the spirits at a less price per gallon than the amount of the tax was not in itself a ground of forfeiture, nor was it in law to be taken absolutely as notice to the purchaser that the spirits had been illegally removed, and that the tax on them had not been paid; that the purchase in that state of the case was a circumstance of suspicion, and that such a circumstance was to be considered by the jury in connection with the other evidence in determining whether or not the claimant, as such purchaser, had actual knowledge of the fraud at the time he bought the spirits. Reference need not be made to the single instruction reported as given, applicable to the other counts, as it was conceded by the district attorney that the point intended to be raised by the exception was not open, as the jury found that the claimant purchased the spirits without knowledge of the fraud or that the tax imposed thereon had not been paid.

*W. A. Field*, Assistant United States District Attorney, for the United States.

*J. W. Richardson* and *M. W. Paine*, for claimant.

CLIFFORD, J. Viewed as an innocent purchaser for value without notice that the spirits had been fraudulently removed from the bonded warehouse, or that the tax imposed thereon had not been paid, as the claimant must be in this investigation, the single question presented for examination and decision is, whether the spirits under the circumstances disclosed in the bill of exceptions were liable to forfeiture at the time the same were seized by the internal-revenue collector for the third collection district. Whatever title to the spirits in controversy the claimant had at the time the same were seized, he acquired by purchase, and if the property in the spirits claimed by his vendor was absolutely forfeited to the United States before he purchased the same, then he acquired nothing by his bargain; but if the title of his vendor was valid at the time of the sale, then the spirits

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were not liable to forfeiture at the time of the seizure, as the verdict of the jury establishes the fact that the claimant is an innocent purchaser for value, without notice that the spirits had been fraudulently removed from the bonded warehouse, or that the tax imposed thereon had not been paid, as alleged in the information.

Examined in that point of view, as the case must be, it is apparent that the liability of the spirits to forfeiture in this case must be deduced, if at all, from the acts of the former owner and not from the acts of the claimant, as every charge against him is negatived by the verdict of the jury. "Distilled spirits found elsewhere than in a bonded warehouse not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid, shall be forfeited." 14 Stat. at Large, 163. Had the provision stopped there, it is quite clear that the forfeiture would have been absolute, and that the spirits might be subsequently seized for that purpose, as well after the same had passed into the hands of an innocent purchaser as while the spirits remained in the hands of the perpetrator of the fraud. Forfeitures made absolute by statute relate back to the time of the commission of the wrongful acts which the statute prohibits. Where the forfeiture is absolute the title to the thing forfeited vests immediately in the government, but where more than one remedy is given, and the government has an election to proceed for the forfeiture or in some other way not involving a forfeiture, the title of the property does not vest in the United States prior to the seizure or the performance of some other equivalent act which amounts to such an election. *United States v. Grundy*, 3 Cran. 338; *Roberts v. Wetherall*, 1 Salk. 228; *Gelston v. Hoyt*, 3 Wheat. 246. Differences of opinion existed at one time among the justices of the Supreme Court, whether a forfeiture for the violation of the revenue laws ever gave such a title to the United States as to overreach a *bona fide* sale to an innocent purchaser when made before seizure and suit for condemnation, but the majority of the court adopted the affirmative of that proposition. *United States v. Bags of Coffee*, 8 Cran. 404; *The Mars*, 8 Cran. 417; *Confiscation Cas.*

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7 Wall. 460. Congress possesses the power to decide in what event a divestiture of title in such a case shall take place, whether on the commission of the offence, the seizure, or the condemnation; and where the act of Congress declares in terms without any qualification or election of remedies that that forfeiture shall take place upon the commission of the offence, it becomes the duty of the court to carry the provision into effect even as against innocent purchasers, in cases where the title is consummated by seizure, suit, and judgment, or decree of condemnation. Such is the settled rule of law where the forfeiture is made absolute upon the commission of the offence; but in all cases where the language employed by Congress is doubtful, it is manifestly proper to resort to the ordinary rules of construction and to the rules of the common law applicable to the subject of forfeiture to assist the mind in coming to a conclusion. Forfeiture, it is said, in the former case, is absolute; but the remark should be received with some qualification, as the title only vests in the United States by relation back to the criminal offence in case where it is consummated by seizure, suit, and judgment or decree. Unless the matter is prosecuted and the title consummated, the act of Congress becomes imperative, as the title of the wrong-doer remains unaffected by his wrongful acts until seizure, suit, and judgment or decree, but the effect of the judgment or decree is to divest his title from the date of the wrongful acts. *United States v. Fifty-six Barrels Whiskey*, 6 Am. Law Reg. N. S. 82; *The Florenzo*, Blatch. & How. 60.

Grant all that as applied to the clause of the section declaring the forfeiture if it stood alone and without any qualification, but the same section contains an alternative clause, as appears by the next sentence, which provides as follows: "Or [such distilled spirits] may immediately upon discovery be seized, and after the assessment of the tax thereon may be sold by the collector for the tax and expenses of seizure and sale." Read together, as the two clauses must be, their true construction is as obvious as any enactment well can be which is expressed in clear and unambiguous language. Such spirits when found elsewhere than in a bonded warehouse, if the

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same have been illegally removed from such a public depository without the payment of the tax imposed by law on the same, may be seized as forfeited to the United States, or the proper officer of the revenue may seize the same under the immediately succeeding clause of the section, and in that event it becomes the duty of the assessor to assess the tax on the same imposed by law, and of the collector to sell the spirits for the tax and expenses of seizure and sale, as expressly provided by the closing paragraph of the sentence. Where the forfeiture is absolute, the entire title of the wrong-doer, when the judgment or decree is rendered, vests in the United States from the date of the wrongful act; but if the forfeiture is made conditional, as, for example, if the United States may elect to proceed by information for a forfeiture or for some other redress not amounting to an absolute forfeiture of the spirits, then the judgment or decree only relates back to the date of the seizure, and does not overreach the title of an innocent purchaser acquired subsequent to the wrongful act of the seller and before the seizure of the spirits, if the purchase was *bona fide* for value and without notice of the wrongful acts of his vendor. *Caldwell v. United States*, 8 How. 366; *Confiscation Cas.*, 7 Wall. 460; *United States v. Grundy et al.*, 3 Cran. 352; *United States v. Morris*, 10 Wheat. 290. Extended remarks to show that the United States in cases arising under the section on which the information in this case is founded, are quite unnecessary, as the express words of the second clause referred to are, that as an alternative remedy the spirits may immediately upon discovery be seized, and after assessment of the tax thereon may be sold, by the collector for the tax and the expenses of the seizure and sale.

Proceedings under that clause are instituted and prosecuted to enforce a lien created by an act of Congress, and the very nature of the proceeding concedes that the title to the spirits seized is still in the wrong-doer, and it is as clear as anything well can be that he is entitled to what remains of the proceeds of the sale after deducting the tax, interest, and expenses, as there is no authority to sell the property for any other purpose. Evidently these considerations dispose of all the exceptions exhibited in

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Hearn v. New England Mutual Marine Insurance Company.

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the record except the one in the instruction given, which is applicable to the other counts, and in respect to that no further remarks are required, as it is conceded that the point is not open under the finding of the jury.

Judgment affirmed.

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GEORGE HEARN v. THE NEW ENGLAND MUTUAL MARINE INSURANCE COMPANY.

BEFORE CLIFFORD AND LOWELL, JJ.

Policies of insurance are regarded as commercial instruments, and are liberally construed; but no evidence of any usage or custom can be admitted to vary or explain their terms when precise and clear.

The voyage was described in the policy as follows: "at and from Liverpool to port in Cuba, and at and thence to port of advice and discharge." *Held*, that "port" cannot be construed to mean "ports," or "port or ports," and the going to a second port in Cuba constituted a deviation.

Parol evidence as to the usage of trade is admissible relating to a written contract in two classes of cases: Where the evidence is offered to prove that the words used in the contract are employed in a peculiar sense in the particular trade to which the contract relates; where the purpose of the evidence is to annex incidents to the contract in matters upon which the contract is silent.

In the latter case, however, the peculiar meaning which it is proposed to attach to the words must not either expressly or by implication vary the terms of the written instrument.

Such evidence is admissible to define what would otherwise be indefinite and obscure, and always with a view to give expression to the presumed intention of the parties.

Under the policy in this case, parol evidence to the effect that it is the usage for vessels bound from Liverpool and back, to discharge at one port and then to proceed to a second port for a return cargo, was not admissible to avoid the effect of a deviation.

If admitted, it would extend the voyage and increase the risk beyond what the language employed warrants the court in believing the parties had in contemplation.

ALL the facts necessary to an understanding of the case are to be found in the opinion.

*B. R. Curtis and Walter Curtis*, for plaintiff.

*Hutchins and Wheeler*, for defendant.

CLIFFORD, J. Policies of insurance against marine risks are liberally construed, as they are regarded as commercial instruments in the strictest sense. Such instruments, where their

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terms are ambiguous, may be explained by parol evidence of the usages of trade; but where the terms employed are clear and precise in themselves, the principles which govern their construction do not vary from those which are applicable to other mercantile instruments, and no evidence of any usage or custom can be admitted to explain, alter, or impair the terms of the contract as made by the parties. *Oelricks et al. v. Ford*, 23 How. 63; *Bliven v. Screw Co.*, 23 How. 431; 1 Arn. (2 Am. ed.) 64.

Insurance was effected in this case at Boston on the 9th of May, 1866, in the sum of five thousand dollars "on charter of the barque Maria Henry, at and from Liverpool to port in Cuba, and at and thence to port of advice and discharge in Europe." When the application for the policy was made, the barque was at Liverpool, and it appears that she loaded at that port with a cargo of coal, and, having been regularly cleared from that port, proceeded thence without difficulty on her outward voyage to the port of St. Jago de Cuba, where she discharged her outward cargo, and that, having discharged her outward cargo, she sailed thence to Mansanilla, another port in Cuba, and there took on board a cargo of the products of the island, and on the 13th of September sailed thence for Europe via Falmouth for orders, and on the 18th of the same month was totally lost on her homeward voyage by perils of the sea. Due notice of the loss was given to the defendants, and the loss is admitted as alleged, but the defendants refused to pay the amount insured, or any part of the same, upon the ground that the barque, without any justifying cause, departed from the prescribed course of the voyage as described in the policy on which the action is founded. Reference was made in that proposition to the fact that the vessel, after she went to St. Jago de Cuba and there discharged her outward cargo, proceeded thence to Mansanilla for a return cargo before she sailed for Europe; but the plaintiff contended that going to a second port in Cuba did not constitute a deviation, as it is the usage for vessels bound from Liverpool and back, to discharge at one port and then to proceed to a second port for a return cargo. Nothing of the kind is expressed in the policy of insurance, if the words are to be taken in their ordinary signification; but the

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theory of the plaintiff is that such is the usage of the trade, and he insisted that parol evidence of such usage was admissible, and that the language of the policy should, in view of that evidence, be construed as conferring that right. Deviation in marine insurance is understood to mean a voluntary departure without necessity or reasonable cause from the regular and usual course of the specified voyage insured, which in this case was to port in Cuba, and at and thence to port of advice and discharge, as plainly and explicitly expressed in the policy. Whenever a deviation of that kind takes place, the voyage is determined and the underwriters are discharged from any responsibility. Park on Ins. 294 ; *Elliot et al. v. Wilson et al.*, 4 Brown Parl. Cas. 470.

Different language is sometimes employed, as where the voyage is described as one from the port of departure to Cuba or to the island of Cuba, but the terms of the policy in the case before the court are "at and from Liverpool to port in Cuba, and at and thence to port of advice and discharge," showing a contract complete in itself, and one expressed in plain, clear, and unambiguous language, employing no terms of art nor any word or phrase of doubtful meaning. Unambiguous as the language is, the court cannot impute to the parties any other intention than that which they have expressed, as the court must do, to hold that port means ports, or port or ports, or to a port of discharge, and also to a second port for a return cargo and at and thence "to port of advice and discharge." Precisely the same question was presented in the case of *Brown v. Tayleur*, 4 Ad. & Ell. 241, and the court held that the word "port" in such a policy could not be construed to mean ports, nor port or ports, and that the going to a second port in such a case constituted a deviation, the judges giving their opinions *seriatim*, and all concurring in the conclusion. *Sea Ins. Co v. Gavin*, 4 Bligh. N. S. 578 ; Same Case, 2 Dow & Clark, 125. Evidence of usage, such as the plaintiff assumes in argument that he has offered in this case, if admissible for any legitimate purpose, must be expected to have the effect, and, if fully believed, ought to have the effect, to induce the court to decide that a policy of insurance covering a voyage to a single port in Cuba may be construed, and if the evidence of such usage



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is full to the point, must be construed, to cover not only that voyage, but also a voyage to a second port for a return cargo, even though it be necessary in order to accomplish the purpose, to make a coasting voyage to the opposite side of that large and highly commercial island. Suppose, for example, the master in this case had gone to Matanzas, on the north side of the island, as his port of discharge, he might, under the theory of the plaintiff, have afterwards gone to Trinidad for a return cargo, which is on the southern side of the island. Every policy of insurance, if properly drawn, describes the place of the ship's departure, and also the place of destination, and the reason why a deviation discharges the underwriter is, that if the voyage is changed after the ship sails, the voyage becomes a different one, and not that against which the insurer has undertaken to indemnify. But in the case supposed, the insurer would be held responsible for a voyage from Matanzas to Trinidad, though no such voyage is mentioned in the policy.

Custom or usage is sometimes supposed to be admissible to show that the parties to a written instrument had something in their contemplation more than is expressed in what they have reduced to writing; but Lord Denman well said, in the case of *Trueman v. Loder*, 11 Ad. & Ell. 589, that the cases go no further than to permit the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract. Extrinsic evidence of custom and usage is doubtless admissible in certain cases, where the transaction is of a commercial character, to annex incidents to written contracts in respect to which the contracts are silent, but such evidence cannot be properly received if it is inconsistent with the terms of the written instrument, whether such inconsistency appears by the express terms of the written contract or by reasonable implication from the same as applied to the subject-matter. *Hutton v. Warren*, 1 Mees. & Wels. 475; 1 Smith, La. Cas. 387. Apply that rule, and it is clear that evidence of usage, if offered to show that the barque might go to one port to discharge and to a second for a return cargo, ought not to be admitted, as it is plainly inconsistent with the written contract, which is to port and at and thence to the return port.

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Few cases are to be found where the rule under consideration is better stated and explained than in the case of *Spartali v. Benecke*, 10 C. B. 222, in which the opinion is delivered by the chief justice of the Common Pleas. He admits that evidence as to the usages of trade is admissible in two classes of cases: 1. Where the evidence is offered to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a peculiar sense, and different from what they ordinarily import. 2. That the evidence is also admissible for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but he remarks, what it is important to observe, that both these rules are subject to the limitation or qualification that the peculiar sense or meaning which it is proposed by the evidence to attach to the words of the contract must not vary or contradict *either expressly* or by implication the terms of the written instrument. Such evidence is admitted for the purpose of defining what would otherwise be indefinite, or to interpret a peculiar term, or to explain what is obscure, or to ascertain what is equivocal, or to annex particulars and incidents which, though not mentioned in the contract, were connected with it, or with the relations growing out of the same; but in all these cases the evidence is admitted with a view of giving effect as far as can be done to the presumed intention of the parties. *Humfrey v. Dale*, 7 Ell. & Bl. 273; *Myers v. Sarl*, 3 Ell. & Ell. 318.

Proof of usage may be admitted to explain a word, term, or phrase of doubtful or equivocal meaning, but it cannot be admitted to add to a word of a known and certain signification a meaning beyond what it plainly imports for the purpose of adding a new and different obligation to a written contract. *Phillipps v. Briard*, 1 Hurls & Nor. 25. Usage may be relied on, says Lord Campbell, in the case of *Hall v. Janson*, 4 Ell. & Bl. 510, to show the sense in which an expression found in a written contract is used in a particular trade, but to let in verbal evidence of a usage for the purpose of contradicting and nullifying an express written contract would be contrary to all principle, and has been forbidden as often as the attempt has been

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made. Commercial usage, said Judge Story, in the case of *The Reeside*, 2 Sum. 567, can never be resorted to, to control or vary the positive stipulations in a written contract, and *a fortiori* not to contradict them. An express contract of the parties, he held, was always admissible to supersede, vary, or control a usage or custom, but he denied in the most explicit terms that a written contract could be controlled, varied, or contradicted by a usage or custom. Three decisions of the Supreme Court, delivered within the last twelve years, affirm the same rule. *Bliven v. Screw Co.*, 23 How. 431; *Insurance Companies v. Wright*, 1 Wall. 470. "When we have satisfied ourselves," said Mr. Justice Miller, "in the last case cited, that the policy is susceptible of a reasonable construction on its face without the necessity of resorting to extrinsic aid, we have at the same time established that usage or custom cannot be resorted to for that purpose." 2 Greenl. Ev. ss. 251. Omission (in a contract), say the court, in the case of *Thompson v. Riggs*, 5 Wall. 679, may be supplied in some cases by the introduction of such proof, but it cannot prevail over or nullify the express provisions and stipulations of the contract. So where there is no contract, usage will not make one, as it can only be admitted either to interpret the meaning of the language employed by the parties in the absence of express stipulations, or where the meaning is equivocal or obscure.

Decided cases also of high authority and of recent date from the reported decisions of the State courts may be referred to, in which it is held that the clear and explicit language of a contract, mercantile or otherwise, cannot be enlarged or restricted by proof of usage or custom. Strong doubts are expressed by the court in the case of *Seccomb et al. v. Prov. Ins. Co.*, 10 Allen, 314, whether in any case it would now be deemed to be competent to offer evidence to show that a description of a voyage in a policy which is susceptible of a clear and definite exposition in conformity to the interpretation of the words as established by adjudicated cases, has another and different meaning by mercantile usage from that which has been so recognized and settled. Mercantile usage, say the court in that case, in order to be received as explanatory or in aid of the exposition of a policy of insurance, must not on

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the one hand tend to increase materially the risk assumed by the insurers, nor on the other hand to deprive the assured of the indemnity which the words of the contract fairly interpreted secure to him in case of loss. Examined in the light of these rules, as given substantially in the case last cited, the court is of the opinion that the usage relied on by the plaintiff, if the evidence offered showed that it exists as he supposes, would not be admissible to avoid the effect of the deviation, as, if admitted, it would enlarge the voyage insured as described in the policy, and would materially increase the risk cast upon the underwriters beyond what the language employed warrants the court in believing they had in contemplation when the contract was executed. *Dickinson v. Gay et al.*, 7 Allen, 36; *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. 149.

Authorities to show that evidence, even of general usage, is never admissible to contradict the settled rules of law cannot be necessary, as they are all one way from the earliest period to the present time; and that remark is just as applicable to a commercial contract as to one where the construction of the instrument is governed by the principles of the common law. *Rankin v. Am. Ins. Co.*, 1 Hall S. C. 619; 2 Pars. Mar. L. 58; 1 Duer on Ins. 177-233; *Edie v. East India Co.*, 2 Burr. 1216; *Homer v. Dorr*, 10 Mass. 26; *Frith v. Barker*, 2 Johns. 327. Parol evidence of usage may be admissible to explain what is doubtful, but it is never admissible to contradict what is plain. *Blackett v. Assurance Co.*, 2 Crompt. & Jor. 249; *Cox v. Heisley*, 19 Penn. St. 247. Incidental matters, it is said, may be supplied by usage where the policy is silent, but the policy in this case is not silent as to the matter in question, as the description of the voyage is plain and unambiguous,—on charter at and from Liverpool to port in Cuba, and at and thence to port of advice. *Vandervoort v. Smith*, 2 Caines R. 160; 1 Pars. Ship. & Ad. 83; 2 Phil. Ev. (Ed. 1859) 789; *Steward v. Scudder*, 4 Zab. 96; *Foley v. Mason*, 6 Md. 37. Where the contract is clear, certain, and distinct, it is not subject to modification by proof of custom. Such a contract disposes of all customs and usages by its own terms, and by its terms alone is the conduct of the parties to be regulated, and their liability to

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be determined. *Simmons v. Law*, 3 Keyes, 219; *Wescott v. Thompson*, 18 N. Y. 367.

Certain cases are cited by the plaintiff, which, it is suggested, support the opposite theory, but when carefully examined it will be found that they do not have any such tendency. *Warre v. Miller*, 4 Barn. & Cress. 693; *Cruickshank v. Janson*, 2 Taunt. 301; *Dickey v. Ins. Co.*, 7 Cran. 327. At and from Grenada to London was the description of the voyage in the first case, and at and from Jamaica in the second, and at and from Trinidad in the case decided in the Supreme Court. Evidence was introduced in the first case showing that there was but one custom-house for the whole island of Grenada, and inasmuch as the voyage insured was at and from Grenada and not at and from a port in Grenada, the court decided that the island must be considered as all one place, and that there was no deviation, although the vessel went to three places to discharge. Nothing different is asserted in the second case, and in the third the court decided that where the voyage as described in the policy is "at and from an island," the vessel may sail from port to port to take in cargo, but the decision has no application to the case at bar, as the voyage described in this case is *to port* in Cuba and at and thence to port of advice, which shows that the two cases are in no respect analogous. Underwriters are presumed to be acquainted with the course of the trade they insure and with its peculiarities, and the court decided, in the case of *Noble v. Kennoway*, 1 Doug. 510, that in that trade, which was the Labrador trade, greater delay in landing the cargo was customary than would be justifiable in most other adventures, but it is not perceived that the case has much bearing upon the question under consideration. *Vallance v. Dewar*, 1 Camp. 503. Undoubtedly, evidence of usage was also admitted to explain the terms of the contract in the case of *Salvador v. Hopkins*, 3 Burr. 1707, as suggested by the plaintiff, but the motion for new trial was overruled and the decision of the court placed expressly upon the ground that the evidence offered and admitted was not repugnant to the contract. Other cases of an analogous character are also referred to, where evidence of usage was admitted to explain some ambiguous phrase

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in the terms of the contract to which the same answer may be given, that the evidence admitted did not contradict what was in writing. *Uhde v. Walters*, 3 Camp. 15; *Hyde v. Willis*, 3 Camp. 200. Such evidence was also admitted in the case of *Gracie v. Marine Ins. Co.*, 8 Cran. 75, to show the boundaries and extent of a commercial port named in the policy as the port of destination, and it is quite clear that the ruling was correct, as the evidence tended to explain and not to contradict the terms of the policy, and a like ruling is found in the case of *Lowry v. Russell*, 8 Pick. 362, where the court overruled the objection to the evidence expressly upon the ground that it did not contradict the terms of the bill of lading. Reliance is also placed upon the case of *Bulkley v. Protection Ins. Co.*, 2 Paine, C. C., 89, but the case was decided wholly irrespective of any such question, as the evidence introduced failed to show that there was any such usage as the plaintiff supposed. The policy in that case described the voyage as from Ocrocoke to St. Bartholomew or St. Thomas, and at and from thence to Tobasco, and the court, and rightly, held that it did not authorize the assured to go to both ports, that he might go to either at his election, and that, having first stopped at the island of St. Bartholomew and afterwards proceeded to St. Thomas, it was a deviation. "That the policy only covers a voyage to one or the other of those islands," said the judge, "cannot admit of a doubt," and if the sentence stopped there the case would be consistent with the recent decision of the Supreme Court, and all the other modern decisions upon the subject, but he adds, in continuation of the same sentence, "unless justified by usage," leaving it to be inferred that his opinion was that the evidence of usage would be admissible to incorporate a different meaning into the contract. But he could hardly have intended what the words imply, as in the next sentence he says that "it was at the election of the assured to go to either, to the one or the other, but the language of the policy is too plain and explicit to admit of a construction that it authorized a voyage to both," in which latter view we entirely concur.

Support to the views of the plaintiff cannot be derived from

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the case of *De Peyster v. Sun Mutual Ins. Co.*, 19 N. Y. 276, as the court held, irrespective of usage, that the three additional ports allowed by the addition made to the policy, included ports on the main, and referred to ports to be touched before finally leaving the main for the return voyage. Viewed in the most favorable light for the plaintiff, the court only allowed the evidence of usage to be received as explanatory of what was doubtful and not as contradicting any part of the contract.

Submitted as the case was under the act of Congress, which authorizes parties to waive a jury by stipulation in writing, the court will proceed to a brief examination of the evidence of usage offered by the plaintiff, and admitted *de bene* by the court. Vessels frequently go to a second port, as the evidence offered shows, for their return cargo, but it is equally well established by the same depositions that they always do so under an express stipulation in the charter-party so to do, if required by the charterer, and not because any usage exists obliging them to go to a second port in cases where there is no stipulation to that effect. Evidence to support that theory of fact is found in the charter before the court, as it provides that the vessel "shall proceed to a safe port in Cuba for orders (Havana excepted), and there discharge the same [meaning the cargo], after which shall there <sup>and</sup><sub>or</sub> at one other usual place in the island, load," etc. Had that language been incorporated into the policy of insurance, the question would be one of easy solution, but the charter-party is a contract between the owners of the vessel and the charterer, and is not in any aspect of the case to be regarded as the contract between the insurers and the insured. They have made their own contract, and the court, in ascertaining what their rights are under it, must look at its terms. Such a policy of insurance may be made to cover the whole voyage or a part of it, as the parties find it for their interest to contract. Insurance to port in Cuba and at and thence to port of advice might have been all that the insured desired, as he might know that his vessel would load at port of discharge, and in that state of the case he might not be willing to pay the additional premium for the risk of insuring the voyage to a second port. Conjectures, however, are unneces-



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sary, as the conclusive answer to the theory of the plaintiff is that he did not contract with the insurers for the privilege to go to a second port, and the evidence which he offered upon the subject of usage does not show the existence of any such usage as he supposes. The deponents testify that vessels almost always go to a second port, but all the witnesses, or nearly all of them, agree that they do so by virtue of an express stipulation in the charter-party requiring them to do so, if the charterer so directs. They do not show that there is any usage which warrants a vessel in going to a second port under a policy of insurance, where its terms are from Liverpool to port in Cuba and at and thence to port of advice. Instead of that, most of the witnesses who testify in answer to such an inquiry express most decided opinions that under such a policy the vessel would be restricted to the port of discharge.

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GEORGE HEARN v. EQUITABLE SAFETY INSURANCE COMPANY.

BEFORE CLIFFORD AND LOWELL, JJ.

Issues of fact in civil cases in any Circuit Court may be tried and determined by the court without the intervention of a jury whenever the parties, or their attorneys of record, file with the clerk a stipulation waiving a jury.

The terms in a policy of insurance were "to a port of discharge in Cuba and at and thence to a port of advice." *Held*, that the policy protected the insured in a voyage from the port of loading to a port of discharge in Cuba, and at and thence to the port of advice.

It cannot be made to give any further protection without adding words to the contract.

Depositions offered to show that on a voyage of this kind the vessel might, under a usage, go to a second port in Cuba to load, were admitted *de bene esse*.

It does not establish a usage that vessels have the right to so go to a second port in Cuba and load, under a policy in the terms of this one, to show that Cuba charters from Liverpool and back contain an express stipulation that the charterers shall have the option of a second port of loading.

Matter of contract and usage or evidence of usage are quite different.

Correspondence between insurer and insured prior to the execution of the policy is inadmissible to vary the terms of the policy, but the court thought it proper to examine the letters.

Whether the policy was drawn in accordance with the contract disclosed by the letters is not a question for determination in a suit at law; it must be understood in this case in

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this form that all negotiations antecedent to the date of the policy were merged in the written instrument.

The policy only authorized a voyage to a port of discharge in Cuba, and at and thence to port of advice.

THE facts and the terms of the policy in this case, both of which are similar to those of the preceding one, also appear in the opinion of the court.

*B. R. Curtis* and *Walter Curtis*, for plaintiff.

*Hutchins* and *Wheeler*, for defendants.

CLIFFORD, J. Issues of fact in Civil Cases in any Circuit Court may be tried and determined by the court without the intervention of a jury, whenever the parties or their attorneys of record file a stipulation in writing with the clerk of the court waiving a jury. 13 Stat. at Large, 501. Pursuant to that provision the parties in this case, as well as in the preceding one, filed a written stipulation submitting the controversy, both law and fact, to the determination of the court. It is an action of assumpsit on a policy of insurance, dated May 11, 1866, to recover the sum of four thousand dollars, insured "on charter of Barque Maria Henry at and from Liverpool to a port of discharge in Cuba, and at and thence to port of advice and destination in Europe."

By a comparison of the terms of the policy in this case with the terms of the policy in the case just decided, it will be seen that the only difference between the two is rather in favor of the defendants in the present case, as the policy is, "to a port of discharge in Cuba, and at and thence to port of advice," while in the other the language of the policy is "to port in Cuba and at and thence to port of advice." Well expressed as the terms of the policy are, it is clear that by its true construction the policy protects the insured in a voyage from the port of loading to port of discharge in Cuba, and at and thence to port of advice, and it is equally clear that it cannot be held to give any further protection without adding words to the contract which it does not contain, as the intention of the parties is as plainly and unambiguously expressed as it can be by any form of expression which our language affords. Under that policy the vessel was only justified in going to her port of discharge in Cuba, and

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thence to Europe, and her homeward voyage was to commence at her port of discharge. Where the parties express their intention in clear and unambiguous language, courts of justice are bound by what the parties have written, and all the authorities which sustain the conclusion of the court in the preceding case are alike applicable in the construction of the policy in the present case. Evidence of usage in such a case cannot be admitted, as the terms of the contract are incapable of any other meaning than that which is plainly expressed by the language which the parties have employed. Different views were entertained by the plaintiff, and he offered in this case the same depositions to prove the alleged usage, that the vessel in such a voyage might go to a second port to load, as were offered in the preceding case, and they were admitted *de bene*, subject to the same conditions. Suffice it to say, as was remarked in the other case, the witnesses prove that in all Cuba charters from Liverpool and back, the express stipulation in the charter party is that the charterers shall have the option of a second port of loading. They show the fact to be that vessels in that trade do ordinarily have leave to use two ports, but the evidence does not show that they have that privilege by force of any usage. On the contrary, every witness who says anything upon the subject, or nearly every one, states that the privilege of the second port is conferred by virtue of the express terms of the charter party. Contract is one thing, but usage or evidence of usage is another, and a very different thing. Usage will not make a contract, nor is the evidence of it admissible to incorporate into a contract any right or privilege to either not conceded or secured by its terms. If examined with care it will be seen that the evidence does not prove that there is any usage that a vessel under a policy whose terms are to port of discharge in Cuba, and at and thence to port of advice in Europe, may go to a second port in Cuba to load.

Nothing of the kind is shown by the depositions offered in evidence, and without proof to that effect it cannot be pretended that the plaintiff can recover in this case. Correspondence between the parties which took place antecedent to the execution

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of the policy, was offered in evidence to show that the voyage intended to be covered by the policy was such an one as the plaintiff assumes is now covered by its terms. Although such evidence is inadmissible to enlarge or diminish the terms of a written instrument, still the court has thought it proper to examine the letters produced. They are brief and explicit, and it is impossible to read them without being satisfied that the parties at that time contemplated the insurance of a charter from Europe to Cuba and back to Europe. Such certainly was the proposal made by the plaintiff in his letter of the 2d of May, 1866, and the defendants by their letter to the plaintiff of the 8th of May following, agreed to "write upon the charter of the Barque Maria Henry as proposed by you from Europe to Cuba, and back to Europe" at the rate therein named. Such was the plain language of the first two letters, and the defendants in the same letter added, "It is worth something, you know, to cover the risk at port of loading in Cuba," and to that letter the plaintiff on the 9th of that month replied, "I accept of your proposition in reference to the insurance of the charter of the barque Maria Henry. Please insure four thousand dollars, three and a half on the charter valued at sixteen thousand dollars at and from Liverpool to Cuba and to Europe *via* a market port for orders, where to discharge," and without further correspondence, so far as appears, the present policy was executed. Whether the policy in the suit before the court is drawn in accordance with the contract of insurance is not at this time a question for consideration as in a suit at law; it must be understood that all the preliminary negotiations were merged in the written instrument, and of course such correspondence cannot be received to vary the contract as evidenced by the policy, and must be laid out of the case. Tested by the terms of the policy as it now reads, it only authorized a voyage to port of discharge in Cuba, and at and thence to port of advice, and under that contract the vessel was not justified in going to other ports in Cuba, as she might probably have done, if the policy had covered a voyage from Liverpool to Cuba and at and thence to port of advice.

Judgment for the defendants.

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New England Mutual Marine Insurance Company v. Dunham.

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MAY TERM, 1871.

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NEW ENGLAND MUTUAL MARINE INSURANCE COMPANY, Respondents and Appellants, v. THOMAS DUNHAM, Libellant.

BEFORE CLIFFORD AND SHEPLEY, JJ.

Where a vessel is insured, suffers loss and damage by collision with another vessel, and recovers from the owners thereof upon the ground that such vessel was in fault and the cause of the disaster, the amount so recovered is no bar to a further recovery from the underwriters, if it can be shown that the amount recovered in the collision suit is not equal to what it cost to repair the damages consequent upon the collision.

If the insured acts with diligence and in good faith he may pursue his remedy against the colliding vessel, and then, in his adjustment with his underwriters, he is obliged to account only for what he received from the owners of the vessel in fault.

The owners of the injured vessel may proceed and recover, and if they recover full satisfaction, or without suit accept satisfaction, such satisfaction is a discharge of all the parties liable.

In this case the underwriters are liable for the damage by contract, and the vessel causing the injury, for a marine tort, and the party injured may elect against which he will proceed.

The well-settled rule in collision cases is, in the Federal courts, that the damages assessed against the respondent shall be sufficient to restore the insured vessel to the condition in which she was at the time the collision occurred, and that there shall not in insurance cases be any deduction for the new materials in place of the old.

While the District Court has jurisdiction of marine insurance, it is not exclusive in consequence of section 9 of the Judiciary Act.

ON the 2d of March, 1863, the respondents contracted with the libellant as the owner of the barque, called the Albina, to insure the barque against the perils of the sea, mentioned in the policy of insurance in the sum of ten thousand dollars for the term of one year, which term was subsequently extended by an indorsement on the policy to the time of the arrival of the barque at her port of destination. Damage from perils of the sea was suffered by the barque on a voyage or passage from Cardiff to New York, but the barque put into the port of London, where she was fully repaired; and the case shows that the whole ex-

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pense incurred for the repairs has been adjusted and paid by the underwriters. Thoroughly repaired, the barque, on the 7th of March, 1864, sailed on the voyage from London to New York, and on the 13th of the same month she came in collision with the ship Donald McKay, by which she was so much damaged that it became necessary for her to put back to London, where she was again repaired at the cost, as alleged, of £ 5,564 13s. 2d., and, having been so repaired, she sailed for her port of destination and arrived there in safety. Before leaving London, the master of the barque filed a libel in the Admiralty Court there against the ship, claiming damages for the injuries received by the collision, and a cross-suit was brought in behalf of the ship against the barque for the same purpose, alleging that the fault which occasioned the collision was committed by those in charge of the barque. Both causes were heard at the same time, and the court adjudged that the sole fault which occasioned the collision was committed by those in charge of the ship, and referred the cause to a registrar of the court to assess the damages. He allowed the sum of £4,634 7s. 5d., rejecting in whole or in part some of the expenses incurred for the repairs. His report was accepted by the court, and a decree was entered accordingly, and the amount allowed was paid to the libellant. After the barque arrived at her port of destination, the libellant caused an adjustment to be made, as of a partial loss, deducting from each item the sum allowed by the registrar, and, the respondents failing to pay the balance claimed, the libellant filed the libel in this case to recover the balance so found, together with fees and expenses of counsel and witnesses in that suit, with interest and exchange, as set forth in the adjustment. Appended to the agreed statement of facts was the stipulation that the cause should be sent to an assessor to ascertain the amount, if the court be of the opinion that the libellant was entitled to more than the amount allowed by the registrar. Hearing was had in the District Court, and the court being of the opinion that a balance was due to the libellant beyond the sum allowed by the registrar, the parties appeared and modified their agreement that the cause should in that state of the case

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be sent to an assessor. Instead of that, each party filed an adjustment, and they agreed that each adjustment so filed should be treated and considered as an alternative report of an assessor, each party to be at liberty to object to the adjustment of the other, and the case to be subject to appeal by either party. For reasons not explained, it seems that the libellant recovered in the foreign court much less than the full amount of the repairs, and expenses made and incurred in consequence of the collision, and in the adjustment presented by the libellant he deducted the amount recovered and paid in the collision suit from the amount of the moneys expended in making the repairs and discharging the expenses incurred in consequence of the collision, which left a balance to be paid by the insurers. He admitted that in adjusting that balance so found, it was proper to make the computation by the rule applicable in insurance adjustments, that is, that one third new for old must be deducted, but he denied that that rule had any application in crediting the amount collected of the colliding vessel. On the contrary, he deducted the amount collected of the colliding vessel from the gross amount paid for the repairs, and the District Court adopted his adjustment and entered a decree for the balance, amounting to \$1,700.56 damages, and costs of suit.

*F. C. Loring*, for libellant. .

*Hutchins* and *Wheeler*, for respondents and appellants.

CLIFFORD, J. Amounts, it seems, were not in controversy, but the respondents differed widely from the libellant as to the correct rule of adjustment. They insisted that the partial loss should be first adjusted between them as the underwriters and the libellant, deducting one third new for old, and that the libellant could recover nothing of them in this case, as the loss, when so adjusted, did not exceed the amount paid by the colliding vessel or her owners. Suppose that to be the correct mode of adjusting the partial loss, then it is clear that the libel should have been dismissed, as the libellant was fully paid by the amount recovered in the collision case; but the district judge adopted the rule of adjustment presented by the libellant, and entered a decree in his favor for the balance therein shown, and the re-



spondents appealed to this court. Apart from the merits, when the cause came to be argued in this court, the respondents insisted that the District Court had no jurisdiction of the cause of action set forth in the libel. Both parties were heard upon the question of jurisdiction as well as upon the merits, and the presiding justice entertaining doubts whether the District Court, sitting in admiralty, had jurisdiction of the case, it was ordered that the question should be reargued, and the parties were heard a second time upon the question, the Circuit judge sitting with the presiding justice. Difficulties attending the solution of the question and the opinions of the judges being opposed, the question was certified to the Supreme Court, where it was held that the contract of marine insurance is a maritime contract, and that libels of the kind exhibited in the record are properly cognizable in the District Courts under the ninth section of the Judiciary Act, which provides that such courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction. *Ins. Co. v. Dunham*, 11 Wall. 21.

Judge Story decided in the same way in *De Lovio v. Boit*, 2 Gall. 398, and that decision had been followed once or twice in this circuit before the decision of the District Court in this case. *Hale v. Wash. Ins. Co.*, 2 Story, 183; *Ins. Co. v. Younger*, 2 Cur. 333. Jurisdiction in admiralty under the Constitution and laws of Congress must be determined, in a great measure, by a just reference to the laws of the States, and the usages of the courts prevailing in the States at the time when the Constitution was adopted. *Cunningham v. Hall*, 1 Cliff. 52. Conclusive evidence was exhibited in argument by the libellant in this case, that the Admiralty Courts existing in the States before the Constitution was adopted did exercise jurisdiction over such controversies, and in view of that fact and of the further fact that the better opinion is that the contract of marine insurance is a maritime contract, the Supreme Court came to the conclusion that jurisdiction in this case was properly assumed by the District Court. Such jurisdiction, of course, is not exclusive in the Admiralty, as suitors, by virtue of the saving clause in the ninth section of the Judiciary

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Act, have the right of a common law remedy in all cases where the common law is competent to give it, and the common law is as competent as the admiralty to give a remedy in such a case, as the suit must be *in personam* against the underwriters named in the policy. *The Belfast*, 7 Wall. 642; *Leon v. Galceran*, 11 Wall. 190. Determined as the question of jurisdiction has been by the Supreme Court, nothing remains open here but the single question as to the proper mode of adjustment. Other questions on the merits might have been raised, but the record does not exhibit any exception as to the amount allowed save what appears in the objection of the respondents to the rule of adjustment adopted by the court. Undoubtedly in insurance adjustments where timbers or other materials are replaced by new, the vessel when repaired is, in general, considered to be better than she was before the repairs were made, and the rule of adjustment is that the assured must himself bear one third part of the expense of the labor and materials for the repairs, for the reason that new timbers and materials are substituted for the old, which are supposed to have been of less value. 1 Phil. on Ins. (4th ed.) 50. 2 Phil. on Ins. 1431. *Peele v. Merchants Ins. Co.*, 3 Mas. 27; *Bradlie v. Ins. Co.*, 12 Pet. 399. Much discussion of that topic, however, is unnecessary, as the general rule is everywhere acknowledged in the Federal courts; but it is equally well settled that the rule in collision cases is that the damages assessed against the respondent shall be sufficient to restore the insured vessel to the condition in which she was at the time the collision occurred; that there shall not in insurance cases be any deduction for the new materials furnished in the place of the old. *The Baltimore*, 8 Wall. 385. *Williamson v. Barrett*, 13 How. 110; Sedgw. on Dam. (4th ed.) 541. Attempt was made in the court below to set up the decree in the foreign court as rendered in the collision case, and the payment of the amount recovered as a bar to any further claim by the libellant upon the respondents for any damages, costs, or expenses occasioned by the collision; but that defence is not urged in this court, as it clearly could not be with any hope that it would be successful. Judgments and decrees bind parties and privies, but it is clear

that the decree in the foreign court was *res inter alios*, and that it cannot have any effect here except as evidence to show the amount recovered by the libellant in that proceeding. *Murray v. Lovejoy*, 2 Cliff., 195; Same Case, 3 Wall, 17. Where a party receives damage, and several are responsible for the injury, the plaintiff is not entitled to but one satisfaction, and if he proceeds against one, and recovers judgment, and the same is fully satisfied, or if he without suit accepts satisfaction of one of those liable for the injury, no doubt is entertained that such satisfaction discharges all the other parties. Grant that, still it is clear that that rule has no application in the case before the court, as the respondents are liable in contract as set forth in the policy of insurance, and the owners of the colliding vessel were liable as wrong-doers for a marine tort. *Randal v. Cockran*, 1 Ves. 98; *Yates v. Whyte*, 4 Bing. N. C. 272; *White v. Dobinson*, 14 Simons, 273.

Full satisfaction, though received from a wrong-doer as in this case, would doubtless operate as a discharge of the claim upon the underwriters; but it is equally certain that nothing short of a full satisfaction would have that effect in the absence of fraud or proof of collusion or negligence. *Atlantic Ins. Co. v. Storrow*, 5 Paige, 285. Persons insured are at liberty in such a case to sue the wrong-doer first, or they may claim compensation from the underwriters, and leave them to their remedy against the wrong-doer, which must be prosecuted in the name of the injured party. When the underwriters pay the loss they are subrogated to all the rights of the insured, but until they do make satisfaction they have no claim on any such wrong-doers. They have a right to expect that the insured will act with due diligence and in good faith, but they cannot be regarded as subrogated to the rights of the insured until they have made such satisfaction. Prior to such satisfaction being made by the underwriters, the insured may, if he sees fit, pursue his remedy against the wrong-doer, and if he acts with due diligence and in good faith; he is only obliged to account in his adjustment with the underwriters for what he receives from the wrong-doer. Such is the settled law in cases of fire insurance, and the same

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rule, in the opinion of the court, must be applied in marine insurance in cases where the suit against the wrong-doers is prosecuted by the insured. Where property in the city of New York, which was insured, was destroyed by order of the mayor and aldermen to prevent the spreading of the fire, and the assured afterwards obtained an assessment of his damages for the destruction of his property, by a jury in conformity to the law of the State, it was held by the chancellor that such assessment was not evidence, as between the assured and the underwriters, of the amount of the loss, and that the assured was entitled to recover of the insurers the whole amount of his loss in consequence of the fire, after deducting therefrom the net proceeds of what had been recovered from the corporation of the city, provided such balance did not exceed the sum for which the insurers were liable under the policy. *Pentz et al. v. Ins. Co.*, 9 Paige Ch. 569.

Apply that rule to the case before the court, and it is clear that the decree of the District Court was correct, and for the reasons assigned by the district judge. He adopted the adjustment presented by the libellant, by which it appears that the amount paid by the owners of the colliding vessel was deducted from the whole expenses of the repairs, and that two thirds of the balance, that is, deducting one third new for old, were claimed of the underwriters. Certain other topics are discussed in the brief of the respondents, but it is not necessary to enter that field of discussion, as there are no exceptions raising any such questions.

Decree affirmed with costs.

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**ENOCH G. SWEATT, Petitioner for Revision, v. THE BOSTON, HARTFORD, AND ERIE RAILROAD COMPANY AND SETH ADAMS, Petitioning Creditor in Bankruptcy.**

Railroad companies are private commercial corporations within the meaning of § 37 of the Bankrupt Act, and the District Courts of the United States have therefore jurisdiction to adjudge such corporations bankrupt, the same as in the case of other debtors.

Characteristics of a public nature attach to every corporation, inasmuch as they are created for the public benefit; but if it is not created for the administration of political or municipal power, the corporation is private, unless the whole interest belongs to the government.

Transportation of freight and passengers from one State to another, or through more than one State, either by land or water, is commerce within the meaning of the provision of the Constitution which gives to Congress power to regulate commerce between the several States.

Congress has power to enact that railroads created by the States shall be liable to the provisions of the Bankrupt Act.

Such corporations are not among those means and instruments of the State governments over which Congress has no power or jurisdiction.

Inasmuch as the exclusive power to establish a uniform system of bankruptcy is vested in the Federal legislature, it has the power to authorize the District Courts or their registers in bankruptcy to transfer the franchise of a railroad company in bankruptcy, it being a private corporation.

PROCEEDINGS in bankruptcy were instituted against the Boston, Hartford, and Erie Railroad Company in the District Court of this district, October 21, 1870, on the petition of Seth Adams, one of the creditors of the company, and on the 2d of March, 1871, the company was adjudged bankrupt on said petition. The petitioner for revision, also one of the creditors of the company, on the 18th of March filed a petition in the Circuit Court praying among other things for a revision and reversal of that decree. Further facts necessary to an understanding of the case are embodied in the opinion.

*J. P. Converse* and *E. A. Kelly* for the petitioner for revision.

*B. F. Butler, C. S. Bradley, W. G. Russel, and T. K. Lothrop,* for the petitioner in bankruptcy and the assignees.

CLIFFORD, J. Circuit Courts within and for the districts where the proceedings in bankruptcy are pending have a general superintendence and jurisdiction of all cases and questions arising under the Bankrupt Act, "and, except when special provision is

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otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as in a court of equity." 14 Stat. at Large, 518. Evidently the revision contemplated by that clause is of a special and summary character, as sufficiently appears from the words "general superintendence" preceding and qualifying the word "jurisdiction," and more clearly from the fact that the power to revise, as conferred, extends to mere questions as well as to cases, and to every interlocutory order in the case pending the proceedings; and also from the language of the second clause of the section, that the powers and jurisdiction therein granted may be exercised either by said court, or by any justice thereof, in term time or vacation. *Morgan v. Thornhill*, 11 Wall. 80. Power to revise "all cases and questions" which arise in the District Court under the Bankrupt Act is conferred upon the Circuit Courts by the first clause of the second section of the act "except when special provision is otherwise made," as appears by the express words of the clause, and the further enactment is that the Circuit Courts in such cases may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case or question in term time or vacation as in a court of equity, showing that all Congress intended by the phrase was to prescribe the rule of decision, whether it was made in court or at chambers.

Original jurisdiction in all matters and proceedings in bankruptcy is conferred upon the District Courts, and they are authorized to hear and adjudicate upon the same, according to the provisions of the Bankrupt Act. Pursuant to that authority the District Courts may exercise original jurisdiction in all suits in equity as well as in suits at law which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against the assignee touching any property or rights of property of said bankrupt, transferable to or vested in such assignee, provided the suit shall be brought within two years from the time the cause of action accrued for or against such assignee. Three conditions must concur in order that the controversy may be cognizable under that clause of the section. It must have respect to some property or rights of prop-

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erty of the bankrupt transferable to or vested in such assignee, and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in that clause and against the other ; but where they all concur, and the suit has proceeded to final judgment or decree in the District Court, the cause may be removed into the Circuit Court for re-examination by writ of error, if it was an action at law, or by an appeal, if it was a suit in equity, provided the debt or damage amounts to more than five hundred dollars, and the proceedings to effect the removal of the cause are reasonable and correct. Appeals under that clause are too late unless the appeal is claimed and the required notices are given, within ten days from the entry of the decision or decree in the District Court, and the act of Congress does not give the Circuit Court any power to enlarge the time. None of those provisions, however, apply to petitions for revision filed under the first clause of that section, nor does the Bankrupt Act fix any precise limitation to the right to file such a petition in the Circuit Court, unless it be that the right must be exercised before the proceedings in the District Court are closed. Leave to apply for such a revision is granted by the act of Congress ; but the act does not prescribe any limitation as to the time within which the application must be made, nor do the rules and regulations promulgated by the Supreme Court ordain any limitation upon the subject. *Littlefield v. Delaware and Hudson Canal Co.*, B. R. 77 ; 14 Stat. at Large, 521. Power to make rules for the orderly conducting business in court is vested in the Circuit Courts as well as in the Supreme Court, provided such rules are not repugnant to the laws of the United States and are not inconsistent with the rules relating to the same subject established by the Supreme Court. 1 Stat. at Large, 83 ; 5 Stat. at Large, 578. Experience, though for a brief period, showed that some regulation was necessary, and the court accordingly, on the 10th of September, 1870, adopted the rule that such an application would not be entertained except by special leave of the court on good cause shown for delay, unless the aggrieved party should give the required notice within ten days from the date of the order or decree described in the petition for revision. Rendered as the decree in



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the District Court was, more than ten days before the present petition was filed in the clerk's office of the Circuit Court, the first question for consideration is whether the petition for revision is properly before the court. Petitions of the kind must be filed within ten days from the entry of the order or decree sought to be revised, unless the time on good cause shown for the delay, is enlarged by special leave of court. Seasonable application for such special leave was made to the presiding justice, but he could not hear it, as he was at the time attending to his official duties in the Supreme Court, nor could the Circuit judge sit, as he, sitting in the absence of the District judge, rendered the decree described in the application. Necessarily postponed as the application was, it is certainly proper that the question as to the sufficiency of the cause shown for the delay in filing the petition should now be heard and determined. 16 Stat. at Large, 174.

Good cause, it is conceded, may exist for such delay, and if such cause is shown in this case the petitioner is entitled to be heard, but if not, then the petition for revision must be dismissed. On the 21st of October the original petition was presented to the District Court, representing that the railroad company had committed certain acts of bankruptcy, and praying that the company might be adjudged bankrupt; as provided in § 39 of the Bankrupt Act. Due process was issued on the same day, returnable on the 4th of November following, and on the return day the company appeared and filed a motion to dismiss the petition for the want of jurisdiction. Both parties were subsequently heard upon that motion, and on the 18th of December last the District Court, the Circuit judge sitting in the absence of the District judge, overruled the motion and decided that the District Court had jurisdiction of the petition. Such jurisdiction being still denied by the company, their counsel on the 23d of the same month filed an application in the Circuit Court, in the form of a bill in equity, to obtain a revision and reversal of that decision under the power conferred by the first clause of § 2 of the Bankrupt Act. Considerable delay ensued, but the petitioning creditor and the company, on the 28th of February last, filed in the clerk's office of the Circuit Court a

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reement in writing to withdraw the application for such re-  
on, and on the 2d of March following the corporation by  
sent of parties was adjudged bankrupt by the District Court.  
lice of that adjudication, in the usual form, directed to the  
sent petitioner, at Woonsocket, in the State of Rhode Isl-  
l, where he resides, was mailed at Boston on the 10th of the  
ne month, and it is conceded that it was received by him  
that place on the following day in due course of mail. He  
ew of the decision overruling the motion to dismiss the origi-  
l petition, and he also knew that an application was filed in  
e Circuit Court to obtain a revision and reversal of that de-  
ion, but he did not know that the company had been adjudged  
nkrupt, nor had he any knowledge of the proceedings which  
l to it until he received that notice. Proper steps were im-  
diately taken to obtain a revision of that decree, but the appli-  
tion for the same was not seasonably filed in the clerk's office  
required by the rule recently adopted by the Circuit Court in  
is district; but if the application had been filed as required, it  
uld not have expedited the hearing, as the Circuit judge could  
t sit in the case and the presiding justice was sitting in the  
preme Court. Some weight should also be given to the fact  
at the rule limiting the time within which such applications  
ust be made has never been promulgated in the district where  
e petitioner resides. Surprise, especially when occasioned by  
e act of the opposite party, is often a good excuse for a want of  
eparation, and it cannot be doubted that the agreement of the  
mpany to withdraw the pending application for a revision of  
at decree had that effect upon the present petitioner. With-  
awn as the application was without notice, the act of with-  
awal must have operated as a surprise to all who were inter-  
ted to obtain a different result. Viewed in the light of the  
ending circumstances, the court is of the opinion that the  
use assigned for the delay in filing the application for revision  
this case is sufficient, and that the petitioner is entitled to be  
ard upon the merits. *In re Alexander*, 3 B. R. 6; *Littlefield*  
*Delaware and Hudson Canal Co.*, 4 B. R. 77.

Three principal errors are assigned by the petitioner in support

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of the pending application, as showing that the order and decree of the District Court should be reversed. They are in substance and effect as follows: 1. That the provisions of the Bankrupt Act do not apply to the corporation adjudged bankrupt by that decree as a railroad corporation is neither a moneyed, business, nor a commercial corporation within the meaning of those words as employed in § 37 of the Bankrupt Act; and, therefore, that the District Court had no jurisdiction of the case set forth in the original petition. 2. That it is not within the constitutional power of Congress to enact that railroads created by a State shall be liable to the provisions of the Bankrupt Act, as such corporations are agencies and instrumentalities of the State for affording their citizens safe and convenient highways for public use, and for the transportation of passengers and freight. 3. That the District Court had no jurisdiction to adjudge the railroad corporation bankrupt in this case, because all the property and assets of the company had been previously transferred to receivers appointed under a decree passed by the Supreme Court of the State.

Congress has the power to establish uniform laws on the subject of bankruptcies, and having exercised that power, the presumption is that it was rightly exercised, and that all persons and corporations whose pecuniary condition brings them within the provisions of the act, are entitled to the benefits which the act confers, and are made subject to all its obligations and requirements. Moneyed, business, and commercial corporations are certainly within the words of the act, as § 37 enacts that the provisions of the act shall apply to such corporations and to joint stock companies. Wherever the word "person" is used in the act, it must doubtless be construed as including corporations, as § 48 of the act so provides, but that section cannot be construed as including any corporation within the provisions of the Bankrupt Act, except such as are mentioned in § 37 of the act, as the rules therein prescribed regulating the proceedings in such cases do not apply to any other corporations than those previously named in the same section. Corporations not therein described are not subject to the provisions of the Bankrupt

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Act, and it is equally clear that railroad corporations are not moneyed corporations nor joint stock companies within the special meaning of that section. Argument in support of that proposition is unnecessary, as both parties agree to its correctness. Conceded as the proposition is, it may be dismissed without further explanation or remark. Jurisdiction is not claimed upon that ground, but the appellee insists that the word "commercial," as well as the word "business," preceding the word "corporations" in that clause of the section, includes railroad corporations, and that the legal effect of that clause, when properly construed, is to give the District Courts the same jurisdiction in such proceedings against a railroad company as in case of other debtors. Whether the District Courts have jurisdiction in such a case depends, in the first place, upon the terms of the Bankrupt Act, as they clearly cannot exercise any such power, unless it is conferred by that act. Power to establish uniform laws on the subject of bankruptcy throughout the United States, is vested in Congress, and the proposition is beyond doubt that it is as competent for Congress to apply such laws to private corporations created by the States, as to natural persons or to private corporations created by authority of Congress. Much discussion of that topic is unnecessary, as the proposition is conceded by the petitioner, but he insists that railroad corporations are not private corporations, and even if they are, he denies that they are included in the words employed by Congress in the Bankrupt Act. Public corporations are towns, cities, counties, parishes, and the like, which are created and continued for public purposes. Such institutions are the auxiliaries of the States in the important business of municipal rule, and have not the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature, as their objects and duties are incompatible with everything of the nature of compact. *Bonaparte v. Railroad*, Bald. C. C. 222. *Angel, and Ames on Corp.*, § 31; *Bissel v. Jeffersonville*, 24 How. 294. Municipal corporations are created by the authority of the legislature, and they are invested with subordinate legislative powers to be exercised for local purposes connected with the public, but

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all such powers are subject to the control of the legislature of the State. 2 Kent Com. (11th ed.) 275. Private corporations are created by the legislature for an infinite variety of purposes, and their powers are perhaps as various as the purposes they are designed to accomplish. Characteristics of a public nature attach to every corporation, inasmuch as they are created for the public benefit, but if the corporation is not created for the administration of political or municipal power, the corporation is private, unless the whole interest belongs to the government. Banks created by the government solely for its own uses, and where the stock is exclusively owned by the government, are public corporations, but a bank whose stock is owned by private persons is a private corporation, though its object and operations partake of a public nature, and though the government may become a partner in the association by sharing with the corporators in the stock, and Chancellor Kent says that the same thing is true of insurance, canal, bridge, turnpike and railroad companies. 2 Kent Com. (11th ed.) 275. When government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. *United States Bank v. Planters' Bank*, 9 Wheat. 907.

Text-writers everywhere, in treating of the subject under consideration, class railroad companies with banks, insurance companies, canal and steamship companies, turnpike and bridge companies, and assume that all such are private corporations. 1 Redf. on Rail. (3d ed.) 53. "In all these cases the uses may, in a certain sense, be public, but the corporations are private, as much so, indeed, as if the franchises were vested in a single person." *Dartmouth College v. Woodward*, 4 Wheat. 669. Railways are created for the purpose of carrying passengers and freight, and they are everywhere regarded as common carriers when engaged in transporting merchandise and the baggage of their passengers. Steamships which carry freight and packages for all who apply, are also responsible as common carriers. A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him, from place to

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place or from one port to another. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods are of such a kind as to be liable to extraordinary danger, or such as he is not accustomed to convey. Such carriers, whether by land or by water, in the absence of any legislative provisions prescribing a different rule, are insurers, and are liable in all events and for every loss or damage however occasioned, unless it happened by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading. *The Lexington*, 6 How. 381; *The Cordes*, 21 How. 23.

Steamship and steamboat companies, when incorporated and engaged in accomplishing the purpose for which they are created, and canal corporations not of a public character, are undoubtedly commercial corporations within the meaning of that phrase as employed in the Bankrupt Act, and as such are clearly subject to the provisions contained in § 39 of the same act. Created as railways are for the same general purpose as the other corporations named, they are legally known by the same denomination and are properly included in the same classification. All such corporations transact immense amounts of business, and may perhaps, in view of that fact, be well enough called business corporations, but their true legal and constitutional denomination, in the opinion of the court, is that of commercial corporations, as they are enacted for the purpose of transporting passengers and freight, which is a commercial business, as it involves intercourse and an interchange of commodities. Commerce among the States, as well as foreign commerce, is subject to the regulation of Congress, and it is well-settled law that the word "commerce" includes navigation as well as traffic, and that the power to regulate extends to the vehicles of intercourse as well as to the commodities to be exchanged. *Gibbons v. Ogden*, 9 Wheat. 189. Power to regulate commerce, including navigation and commercial intercourse, was one of the primary objects for which the Constitution was adopted, and it is beyond every doubt that the power extends to commerce among the States as well as to foreign commerce. 2 Story on Const. (3d ed.) 4.

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Regulations of the kind may not comprehend that commerce which is completely internal, and which does not extend to or affect other States ; but the railroad in question, and most others, are parts of connecting lines intended to promote commercial intercourse among several States. Such corporations, with their engines and cars, are certainly vehicles of commerce among the States, and as such are commercial corporations within the meaning of the Bankrupt Act, and are proper objects of regulation by Congress under the grant to regulate commerce among the States. Pomeroy, Const. L. 244. Even an incorporated bridge company, where it appeared that the bridge was a connecting link between two railroads, was held by the Supreme Court to be a commercial corporation, and no doubt is entertained but that the decision was correct. *Gilman v. Philadelphia*, 3 Wall. 729.

Comprehensive as the phrase, "among the States," is, it may nevertheless be restricted to that commerce which concerns more States than one, but where railroads incorporated in different States are connected in one continuous line of communication, they are clearly instruments of commerce within the meaning of the Constitution, and as such are commercial corporations within the meaning of the Bankrupt Act, and are subject to congressional regulation. Recent decisions besides the one in this case may be referred to, in which it is held that railroad corporations are business corporations, and as such that they are subject to be adjudged bankrupt as natural persons ; but some difficulties attend that conclusion, as municipal corporations and others not liable to be dealt with under that act transact vast amounts of business as well as railroad corporations. *Alabama and Chattanooga R. R. Co. v. Jones*, 5 B. R. 98 ; *Rankin et al. v. Railroad*, 1 B. R. 196. Those cases and others of like character proceed upon the ground that every corporation transacting business for gain as its chief and ultimate purpose is a business corporation, and as such that it falls within the provisions of the Bankrupt Act, and it may be admitted that every such corporation in a general sense is a business corporation. Serious difficulties, however, are involved in the other branch of the proposition, as moneyed corporations also transact business



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for gain, and it is the chief and ultimate purpose of their creation; but they are not business corporations within the meaning of the Bankrupt Act, as they are legally and properly known by a more distinctive and characteristic denomination. Vast amounts of business are also transacted by municipal corporations, but they are not business corporations in the sense of that law, because they are created for public purposes, and exercise by delegation, a portion of the sovereign power of the State. Religious, charitable, literary, and educational corporations are not subject to the Bankrupt Act, nor are corporations created for political purposes, even though they or some of them may transact large amounts of business, as their chief and ultimate purpose shows that they are not properly denominated moneyed, business, nor commercial corporations. Private corporations are of many kinds, and they are known by certain appellations according to the objects for which they are created. Known as they are by some denomination significant of their distinctive characteristics, indicating their chief and ultimate purpose, there will prove to be no great difficulty in determining whether they are or are not subject to the provisions of the Bankrupt Act. Incorporated banks not of a public character, and insurance companies may be mentioned as examples of the moneyed corporations described in the provisions under consideration. *Veazie Bank v. Fenno*, 8 Wall. 533.

Modern legislation is crowded with private charters creating business corporations in every branch of the industrial pursuits, and no doubt is entertained that all such are business corporations within the meaning of the Bankrupt Act, as expounded by all the courts. Corporations of a commercial character are also subject to the provisions of the Bankrupt Act, and there is no question that railroad corporations, as well as steamship, steamboat, and canal corporations, if the subject of private ownership, are properly included in that classification. Direct authorities may be referred to, showing that a railroad corporation is a commercial corporation, and if that be shown, it must follow, with certainty, that such corporations are subject to the Bankrupt Act, as they fall, in that event, within the very words of § 37.

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Joint-stock companies, by the Irish Bankrupt and Insolvent Act, are made subject to its provisions, and the same act also provides that the words of the act shall include every company and body of persons associated for any banking or other commercial purpose, incorporated by statute or charter, or which derives any immunity, privilege, or power under any act of Parliament, . . . . and all commercial or trading companies or partnerships, etc. Authority is given to railways by the railway acts in that jurisdiction to borrow money, and a certain railway under that authority obtained certain loans, and gave mortgages to secure the payment, with interest, on a given day. Interest not having been paid, the creditor filed an affidavit of his debt in the Court of Bankruptcy for the purpose of having the corporation adjudged a bankrupt. Objection was made to the application upon the ground that railways were not commercial or trading companies, but the judge of the Bankrupt Court overruled the objection and sustained the application. Due appeal was taken to the Court of Appeal in chancery, where the parties were again fully heard, and on a subsequent day the opinion was given by the chancellor. He showed, in the first place, that railways were within all the other conditions of the Bankrupt Act, and then proceeded to say that the only question was whether a railway "is a company for commercial or trading purposes within the signification of those terms as used in the statute," and he held that it was, chiefly upon the ground that railways are "created for the purpose of conducting the business of carriers," remarking that in general, they are common carriers, and recognized as such, with all the liability attached to that character. *In re Bagnalstoun and Wexford Railway Co.*, 15 Irish Ch. R. 491; *Ex parte Barber*, DeGex B. R. 381.

Reported cases, decided by the Supreme Court, confirm that construction and show to a demonstration that the transportation of passengers and freight from one State to another, or through more than one State, whether by land or water, is commerce within the meaning of that provision of the Constitution which gives to Congress the power to regulate commerce among the several States. Express power to regulate commerce among

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the several States is given to Congress, and the words of the grant comprehend every species of commercial intercourse, and the power is complete in itself, and may be exercised to its utmost extent without limitations other than such as are prescribed in the Constitution. *Gibbons v. Ogden*, 9 Wheat. 193; *Brown v. Maryland*, 12 Wheat. 445; *United States v. Coombs*, 12 Pet. 78; *Clinton Bridge*, 10 Wall. 462; Same Case, 16 Am. L. Reg. N. S. 149; *Erie Railway v. State*, 31 N. J. 531.

Confessedly, railroad corporations are created to transport passengers and freight, and it is that precise business in which they are employed. They must, therefore, be held to be commercial corporations. Undoubtedly the word "business," as applied to corporations, has a broader meaning than the word "commercial," as used in the same clause, but it was not the intention of Congress, in the opinion of the court, to give such a scope to the word "business" as to supersede the words "moneyed" and "commercial," and leave them without any practical significance. *Harris v. Amery*, Law Rep. 1 C. P. 154.

Sufficient has already been remarked to show that railroad corporations are not public corporations, but the petitioner for revision insists that a recent decision of this court, as affirmed by the Supreme Court, supports the theory which he assumes in his second proposition. *Buffinton v. Day*, 11 Wall. 113. Taxes, in that case, were assessed against the plaintiff, under the internal revenue laws, upon his salary as judge of probate and insolvency for the county of Barnstable, in this State, and having paid the same under protest, he brought an action of assumpsit against the collector to recover back the amount, and the court held that it was not competent for Congress to impose such a tax upon the salary of a judicial officer of a State. State power to lay and collect taxes for the support of their government may reach every subject over which the sovereign power of the State extends. They cannot, however, tax imports nor exports without the consent of Congress, as they are prohibited from so doing by the Constitution; and the power does not extend to the instruments of the Federal government nor to the constitutional means employed by Congress to carry

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into execution the powers delegated to that government, by the Constitution. Congress may lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare; but that grant of power, when properly construed, does not interfere with the power of the States to levy taxes for the support of their own governments, nor does it extend to the means and instruments of the States any more than the power of the States to levy taxes for the support of their governments can be held to extend to the means and instrument of the governments of the United States. Founded as these principles are in the nature of the government ordained by the Constitution, and in the relation which the States and the United States sustain to each other under that paramount law, they are immutable, and they are expounded and illustrated by a series of the decisions of the Supreme Court, never surpassed in ability, wisdom, and logical power by any ever delivered from the bench of any judicial tribunal. Examined separately or as a whole, they show on the one side that the Federal government, though limited in its powers, is supreme within its sphere of action; that its laws, when passed in pursuance of the Constitution, form the supreme law of the land. On the other hand, they also show that the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people; that the exclusive powers possessed by the United States cannot be exercised by the Federal government, and that the United States and the States in those respects, though exercising jurisdiction within the same territorial limits, are separate and independent sovereignties, acting separately and independently of each other within their respective spheres, just as fully "as if the line of division was traced by landmarks and monuments visible to the eye." *McCulloch v. Maryland*, 4 Wheat. 406; *Gibbons v. Ogden*, 9 Wheat. 204; *Osborn v. Bank*, 9 Wheat. 859; *Brown v. Maryland*, 12 Wheat. 448, 458; *Weston v. Charleston*, 2 Pet. 449; *Dobbins v. Commissioners*, 16 Pet. 447; *The Collector v. Day*, 11 Wall. 124; *National Bank v. Commonwealth*, 9 Wall. 361. What those cases decide, as applied to the present case, is

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that the States cannot tax the means or instruments of the United States, nor can Congress tax the means or instruments of the State governments. By the word "means" is meant the revenue, taxes, and public securities, as applied both to the United States and the several States, and the prohibition extends to the salaries of the executive and judicial officers and to the compensation of Senators, members of Congress, and to that of members of the State legislatures. Officers whose compensation is derived from fees paid by those transacting business with the office stand upon a different footing, but the question whether such compensations fall within the reciprocal exemption is not involved in this case. Even less difficulty is felt in giving examples of what is meant by the instruments of government, as that phrase is used in decided cases. *Austin v. Aldermen*, 7 Wall. 699; *Hamilton County v. Massachusetts*, 6 Wall. 639; *Society for Savings v. Coite*, 6 Wall. 604.

Instruments of government, such as are referred to, are the officers, as such, executive, legislative, and judicial, appointed or chosen to enact, execute, and expound the laws, and the public buildings erected and occupied for the uses of the government. Federal machinery is much more multifarious than that of the States, as the government of the United States is charged with the national defence, and of course our forts, navy-yards, public ships, and the like, fall within the exemption. Public corporations also fall within that exemption, but railways are private corporations, just as much as steamship and steamboat companies or canal corporations, where the stock belongs to the corporators, or as much as moneyed, manufacturing, or business corporations, all of which are created to promote the public good. Doubtless, some such corporations are more convenient and useful than others; but the question before the court is not affected by the degree of importance which attaches to the corporation. Private corporations are not instruments of the State governments, and it is settled law that railways are private corporations, as appears by many decisions of the highest character. *Dartmouth College v. Woodward*, 4 Wheat. 669. State governments sometimes become partners in such corporations, but the State does not, by becoming a corpo-

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rator, identify itself with the corporation. Instead of that the State, in such a case, divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. *United States Bank v. Planters' Bank*, 9 Wheat. 907; *Union Pacific Railroad v. Lincoln County*, 10 Am. L. Reg. N. S. 461. Apart from that proposition of the petitioner, the authority of Congress to subject railroad corporations to the provisions of the Bankrupt Act is also denied, because it is insisted that such a corporation cannot, without distinct legislative authority, make any alienation, absolute or conditional, either of the general franchise to be a corporation, or of the subordinate franchise to manage and carry on its corporate business. Suppose it to be correct that a railroad corporation may not by its own act alienate any of its franchises, either the franchise to exist as such, or the franchise to accomplish the objects for which it was created, still it is conceded that it may transfer the same if so authorized by the State, and it is difficult to see, if the corporation is a private corporation, why the necessary power to enable the District Court or the register, as the case may be, to make the transfer, may not be conferred by Congress, as it is conceded that the exclusive power to establish a uniform system of bankruptcy is vested in the national legislature. 14 Stat. at Large, 522.

Express power is given to Congress to establish such a law, and the Constitution also provides that Congress may "make all laws which shall be necessary and proper for carrying into execution the foregoing powers," and it is clear that one of the powers previously granted is the power to pass such a law. Pursuant to that power, Congress has, in effect, provided that the commercial corporations shall be subject to the Bankrupt Act, and that all the provisions of the act applicable to the debtor, or which set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall, in like manner and with like force, effect, and penalties, apply to each and every officer of such corporation or company

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in relation to the same matter concerning the corporation or company, and their money and property. Prior to that clause, the same section enacts that "like proceedings shall be had and taken" as are provided in the case of debtors, and the section concludes with the enactment that all property and assets of the corporation shall be distributed to the creditors of such corporations in the manner provided in this act in respect to natural persons." More satisfactory regulations for administering the Bankrupt Act than are found in the existing law could not well be framed; and the court, having come to the conclusion that such a corporation is a private corporation, is entirely satisfied that the section of the act which provides that the act shall apply to such a corporation is a valid law. But suppose that the franchise to be a corporation, unless assignable by the laws of the State, is not transmissible under the Bankrupt Act, still it is unquestionably true, as was held by the District Court in this case, that the franchise to build, own, and manage a railroad, and all the property of the company, are alienable and subject to sale and transfer under the laws of the State which created the corporation. *Hall v. Sullivan Railroad*, 21 Law Rep. 140. *Union Pacific Railroad v. Lincoln County*, 10 Am. L. Reg. N. S. 464. Much discussion, however, of that point is unnecessary, as the court here concurs entirely upon that topic with the views expressed by the Circuit judge in disposing of the case in the District Court. *Adams v. Railroad Co.*, 4 B. R. 99.

Extended argument to show that the third proposition of the petitioner cannot be sustained is unnecessary, as the theory of fact assumed in the proposition is erroneous, as appears by the evidence exhibited at the hearing. All the property and assets of the company had not been previously transferred to receivers appointed under a decree passed by the Supreme Court of the State, which is all that need be said upon the subject.

Petition for revision denied.



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**JAMES S. CAREW *et al.* v. THE BOSTON ELASTIC FABRIC COMPANY.**

Where an original patentee has deceased and his estate is under administration, his executor or administrator may make a surrender and obtain a reissue.

The commissioner may allow the original specification to be amended in the reissue, and he may permit the applicant for a reissue to redescribe his invention, including in the new description and claims not only what was well described before, but also what was suggested or indicated in the original specification drawings or patent-office model.

New features, ingredients, or devices, neither described, suggested, or indicated in the original specification or model, cannot be embodied in the new description.

An inventor described his improvement in his original patent as a process for working over vulcanized rubber and moulding it into any desired shape; and stated that in carrying the process into effect many foreign articles of less cost than rubber could be incorporated so as to produce a substance having all the valuable properties of vulcanized rubber at such reduced cost as to admit of its being applied to many more useful purposes. The description in a reissue stated that the principal features of the process consisted in applying heat by means of steam to rubber mixed with substances commonly used in vulcanizing rubber, or to rubber compound which has once been vulcanized either with or without the addition of fresh rubber, the same, whether the rubber or the compound, is or not pressed into moulds or dies of the desired form, and the steam introduced into steam-chambers or steam-jackets, and thereby conducted around the moulds or dies which come in contact with the compound to be moulded into the desired form. The corresponding passage in the original specification was in effect that the principal features of the new process consisted in applying heat either to rubber in its native state, or to rubber with the substances commonly used in vulcanizing rubber which has once been vulcanized by means of steam. The description further stated that the rubber compound while being heated was pressed into moulds or dies to give it the desired form. Also that the steam was conducted around all portions of the moulds or dies which come in contact with the rubber or compound to be moulded. Also, by this means the process of curing rubber was greatly facilitated, and vulcanized rubber which had before resisted all attempts to remould it was readily pressed into any desired shape. *Held*, that the substance of the two descriptions in these portions was the same, and that the original one sustained that of the reissue.

It is the duty of the court to collect the intention and meaning of the inventor from the whole specification, and, if practicable, to adopt such a construction as will render the patent available for the purpose for which it was granted.

It was *held* that the reissued patent did not embrace the invention of Charles Goodyear, which was for curing the native rubber when combined with or in the presence of sulphur by submitting the same to a high degree of artificial heat, and also for a manufacture called vulcanized India-rubber, being a compound of India-rubber with sulphur chemically altered by a high degree of heat, because that invention was disclaimed in the original specification, and it was stated to be the chief feature of the invention to cure again vulcanized rubber and mould it into any desired shape, and because the reissue also stated that the value of vulcanized rubber ceased when the article made out of it was worn out, and that foreign substances might be mixed with rubber compound so as to form a substance having the properties of vulcanized rubber, but composed of cheaper materials.

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Where one paragraph in a reissue specification would seem to lead to a construction which would make void the reissue, explanation of its meaning may be sought in a succeeding one.

Where the process and purpose are plainly suggested and understood, and the language in an original specification is suggestive of new terms and names used in the reissue, such new names and terms do not show that the reissue is descriptive of an invention different from that set out in the original.

The correct practice is, where infringement to any extent is admitted, if the patent is held to be valid, to enter an interlocutory decree for complainant and send the cause to a master to ascertain the amount the complainant is entitled to recover.

Under the act of July 8, 1870, where a decree is entered for complainant, he may recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained, and the court may in its discretion assess the same.

Profits are to be accounted for in such case by the respondent wherever the decretal order to that effect is entered, and if the injuries sustained by the complainant from the infringement are greater than the gains and profits realized by the respondent, then the complainant is entitled to recover compensation for the excess of the injuries beyond the amount estimated for profits of the respondent.

Actual damages are assessed in the first instance, but the court may in its discretion increase the amount to a sum not exceeding three times the amount estimated and assessed as the actual damages sustained beyond the gains and profits realized by the respondent.

ON the 29th of August, 1854, letters-patent were granted to Daniel Hayward, since deceased, for certain new and useful improvements in the manufacture and in the process of manufacturing vulcanized rubber, for the term of fourteen years, and on the 28th of August, 1868, the letters-patent were extended in the name of the executor of the patentee for the further term of seven years from the expiration of the original term of the letters-patent. Subsequent to the extension of the patent, — to wit, on the 15th of December in the same year, — the executor of the original patentee, by deed of assignment in due form, conveyed all his right, title, and interest in the letters-patent to the first-named complainant, through whom, by virtue of certain agreements, the other complainants derived their titles. By virtue of that conveyance the legal title to the letters-patent became vested in the assignee, and the record showed that he, on the 6th of July, 1869, surrendered the letters-patent on account of a defective or insufficient specification, and that a new patent was issued to the same party, and, as the complainant alleged, for the same invention. They also alleged that the original patentee was the original and first inventor of the improvement; that they, the complainants, were the owners of the reissued letters-patent, and

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of the exclusive right to make and use the invention, and vend the same to others to be used, and that they were entitled to be protected in the enjoyment of that exclusive right during the residue of the term for which the reissued letters-patent were granted. Acquiescence by the public in their claim, that the exclusive right to the improvement belonged to them, was also alleged, and that they would have derived large gains and profits from the manufacture of the patented product but for the wrongful doings of the respondents; and they charged that the respondents, ever since the reissued letters-patent were granted, had unlawfully and wrongfully made, used, and sold large quantities of articles composed of the patented product, and manufactured in the manner and by the process patented and secured in their letters-patent, and that they, the respondents, had received great gains and profits from the manufacture and sale of such articles, and from the unlawful use of their invention. Process was issued and duly served, and the respondents appeared and filed an answer. The defences urged were as follows: 1. That the executor of the original patentee was not authorized by law to surrender the original letters-patent and to obtain the reissued letters-patent described in the bill of complaint. 2. That the reissued letters-patent were not granted for the same invention as that described in the specification of the original letters-patent. 3. That the patentee in the original letters-patent was not the original and first inventor of the alleged improvement. 4. That the respondents have not infringed, except to a small extent, the patented invention as alleged in the bill of complaint.

*Whiting and Russell, and J. E. Maynadier, for complainants.*

*George Gifford and F. A. Brooks, for respondents.*

CLIFFORD, J. Authority to accept the surrender of an original patent in certain cases where the specification is defective or insufficient, and to grant a new patent to the inventor of the improvement, is conferred upon the Commissioner of Patents, and where he accepts the surrender and grants a new patent, his decision in the premises, in a suit for infringement, is final and conclusive, unless it is apparent upon the face of the reissued patent, as matter of legal construction, that it is not for the s

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invention as that secured in the original letters-patent. 5 Stat. at Large, 122; 16 Stat. at Large, 206; *Seymour v. Osborn*, 11 Wall. 542.

Controversies of the kind where the original patentee has deceased, and where the reissued letters-patent were in the name of the executor or administrator, have often come before the courts, and the printed arguments for the respondents refer to no decided cases where it is held that the letters-patent are invalid on that account. *Goodyear v. Rubber Co.*, 2 Cliff. 366; Same Case, 9 Wall. 788.

Specifications in letters-patent are frequently found to be defective or insufficient, and where the original patentee has deceased and his estate is under administration, it is difficult to see any solid objection to the power of his executor or administrator to make the surrender and obtain the reissue. Patents which are inoperative or invalid by reason of a defective or insufficient description or specification, if the error arose by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, may be surrendered, and the commissioner is authorized, upon the payment of thirty dollars, to cause a new patent to be issued to the inventor for the same invention for the residue of the period then unexpired, for which the original patent was granted, and the repealed patent act, under which the reissued letters-patent were granted in this case, provided that "in case of his death, or any assignment by him made of the original patent, a similar right shall vest in his executors, administrators, or assigns." 5 Stat. at Large, 122; 16 Stat. at Large, 106.

Reissued letters-patent must, by the express words of the section authorizing the same, be for the same invention, and consequently, where it appears on a comparison of the two instruments as matter of law that the reissued patent is not for the same invention as that secured in the original patent, the reissued patent is invalid, as the commissioner in that state of the case must be held to have exceeded his jurisdiction. Power is unquestionably conferred upon the commissioner to allow the specification to be amended, if the patent is inoperative or invalid, and in that event to issue a new patent in proper form,

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and he may doubtless under that authority allow the patentee to redescribe his invention, and to include in the description and claims of the patent, not only what was well described before, but whatever else was suggested or substantially indicated in the specification, drawings, or patent-office model, which properly belonged to the invention as actually made or perfected. Interpolations of new features, ingredients, or devices, which were neither described, suggested, nor indicated in the original patent or patent-office model, are not allowed, as it is clear that the commissioner has no jurisdiction to grant a reissue unless it be for the same invention as that embodied in the original letters-patent. *Seymour v. Osborn*, 11 Wall. 544.

Apply those rules to the case at bar, and it is clear as anything in legal decision can be, that the second defence set up by the respondents cannot be sustained. Certain parts or passages of the specification of the reissued patent are incorporated into the answer of the respondents as showing that the reissued patent describes and claims an invention or certain features of an invention different from that described and secured in the original patent; but the court is of a different opinion, as everything described in the parts or passages of the original specification selected and embodied in the answer as supporting that defence is found either fully set forth or plainly suggested or substantially indicated by the inventor in the specification or drawings of the original patent. He describes his improvement in the original letters-patent, as a process for working over vulcanized rubber and moulding it into any desired shape; and he states that in carrying the process into effect, many foreign articles of less cost than rubber may be incorporated into the rubber so as to produce a substance or compound having all the valuable properties of vulcanized rubber, at such a reduced cost as to admit of its being more extensively used than heretofore, and to be applied to many new and useful purposes. The respondents select as the chief ground of complaint the following parts or passages contained in the specification of the reissued letters-patent. Pressure, says the patentee, in certain cases is necessarily applied in order to give homogeneousness to the material and to

free it from blisters and other imperfections, and where rubber goods which were vulcanized by the ordinary process in ovens or steam-boilers, are blistered or imperfectly vulcanized, it is found that the defects may be cured by placing the material between steam-jackets and under pressure, and that the blisters and imperfections may be removed by the action of heat and pressure there applied.

Preceding that part of the specification embodied in the answer as the one describing a different invention from that secured in the original patent, the patentee states that in some cases the mere confinement of the compound between the surrounding steam jackets or chambers may be sufficient without the application of any actual pressure before the compound is vulcanized, inasmuch as the material always expands in bulk during the process of vulcanization, which produces a pressure upon the surfaces by which it is surrounded and confined. Vulcanized rubber, the patentee in the reissued letters-patent states, ceased to be of value when the article constructed from it had become worn out, as it is well known that it possesses properties which practically prevent its being used a second time, and he proceeds to represent that the improvement consists in a new process for vulcanizing and moulding any compound of rubber capable of being vulcanized, and that the improvement is applicable also to working over and revulcanizing rubber compound which has already been vulcanized and put to use. He also states that by the process many foreign substances may be intermixed with the ordinary rubber compound, whether already once vulcanized or newly compounded for vulcanization, so as to form a substance having the valuable properties of vulcanized rubber compound although composed in a great part of cheaper materials. Superadded to those representations is the further statement that the principal features of the process consist in applying heat by means of steam to rubber mixed with substances commonly used in vulcanizing rubber, or to rubber compound which has once been vulcanized, either with or without the addition of fresh rubber, the same, whether the rubber or the compound, is or not pressed into moulds or dies of the desired form, and the steam



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introduced into steam-chambers or steam-jackets and thereby conducted around the moulds or dies which come in contact with the compound to be moulded into the desired form. Much reliance is placed upon that passage of the specification of the reissued patent as showing that the specification describes an invention different from that described in the specification of the original patent; but the court is clearly of the opinion that it fails to establish any such proposition within the meaning of the patent law. Some difference undoubtedly exists between the phraseology of that passage and the corresponding passage in the specification of the original patent; but the substance of the two descriptions is the same as clearly appears by comparing that passage with the language employed in the specification of the original patent, in which it is stated that the principal features of the new process consist in applying heat either to rubber in its native state, or to rubber with the substances commonly used in vulcanizing rubber which has once been vulcanized by means of steam. No attempt is made to show that the introductory representation of that passage differs in any essential particular from the corresponding representation in the specification of the reissued patent, but it is insisted that the succeeding portion of the paragraph falls short of sustaining the corresponding feature in the new patent. The court is unable to sustain that proposition, as the patentee states in effect, in continuing the description of his process, that the rubber or compound while thus heated, is pressed *into moulds or dies* which give it the desired form, "the steam being conducted around all portions of the moulds or dies which come in contact with the rubber or compound to be" moulded into the desired form. "By this means the process of curing rubber is greatly facilitated, and vulcanized rubber, which has hitherto resisted all attempts to remould it, is readily pressed into any desired shape."

Other references to the respective specifications might be made to show that the reissued patent is for the same invention as that embodied in the original patent, but it is not necessary to pursue the subject, as it is quite evident that the new patent does not contain anything which is not fully described or substantially sug—



gested in the specifications or drawings of the surrendered patent. Three varieties of apparatus are described as sufficient to illustrate the application of his improved process to the production of different articles manufactured of rubber and its compounds. He then remarks that the essential feature of the process is not the use of such a form of machine, or of moulds or dies, but that it consists in "so introducing steam to the moulds and dies as to cause it to circulate entirely through and around the same, or substantially so, so that substantially every part of the rubber or compound which bears against the moulds or dies shall come in contact with a surface heated by steam," softening the compound so that it may be moulded into the requisite shape or form by the pressure of the dies. Special reference is made to the fact that the words "uneven surfaces," "blisters," or "smoothing surfaces," or "plating articles" are not mentioned in the specifications of the original patent; but it is a sufficient answer to that suggestion to say that the term "mould-ing rubber" and its compounds may well include all that is meant by those particular phrases.

Want of novelty is the next defence, and in connection with the general allegation that the original patentee is not the original and first inventor of the improvement, the defence is presented in two or three special forms which will be noticed as a part of the same defence. Proofs were taken on both sides, and the complainants at the final hearing introduced in evidence the reissued letters-patent as described in the bill of complaint. Such evidence, that is, the letters-patent on which the suit is founded when introduced by the complainant, afford a *prima facie* presumption, if they are in due form, that the patentee is the original and first inventor of what is therein described as his improvement, and the complainants, when the true meaning of the claims of the letters-patent is ascertained, are entitled to the benefit of that presumption. Much difficulty is experienced in determining the true meaning of the specification and claims of the patent, as they contain many expressions tending to support the charge that the patentee of the reissued patent intended to embrace the invention of Charles Goodyear, which

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was for curing the native rubber when combined with or in the presence of sulphur, by submitting the same to the action of a high degree of artificial heat, and also for the new manufacture called vulcanized India-rubber, being a combination of India-rubber with sulphur chemically altered by the application of a high degree of heat. If so construed as to include that invention, the letters-patent would certainly be invalid, as that patent was of a prior origin, and its validity was sustained in this court, and affirmed in the Supreme Court. *Goodyear v. Providence Rubber Co.*, 2 Cliff. 372; Same Case, 9 Wall. 795.

But the rule *ut res magis valeat quam pereat* is as applicable to patents as to any other instruments in regard to which it is the duty of the court to adopt a liberal construction in order to give effect to the intention of the parties. *Ryan v. Goodwin*, 3 Sum. 520; *Evans v. Eaton*, 3 Wheat. 512.

Where doubts arise, it is the duty of the court to collect the intention of the parties from the whole instrument, and, if practicable, to adopt such a construction as will give it effect and render it available for the purpose of which it was granted. Apply that rule to the construction of the letters-patent, and it is quite clear that the specifications and claims of the patent do not embrace what was invented by Charles Goodyear as described in his letters-patent. Express disclaimer of any such pretensions is contained in the original letters-patent, in which the patentee states that he does not claim the curing of india-rubber in its natural state when compounded with sulphur and lead by the use of heat or of steam, nor the compounding of sulphur, white-lead, or coal-tar with india-rubber, and he admits, in terms too explicit to be denied, that "all those have been the subjects of previous patents." Confirmation of that view is also derived from the statement of the patentee in the specification of the original patent, that the leading and most important feature of my improvements is the curing again and reproducing of vulcanized rubber from scraps or fragments which have once been vulcanized. Working over vulcanized rubber and moulding it into any desired shape is, in the opinion of the court, the main feature of the invention as described in the original patent, but

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it is certain that the patentee also states that many foreign articles may be so incorporated with the india-rubber or caoutchouc, either in its native state or when vulcanized, or otherwise prepared, as to produce a substance which has all the properties of vulcanized rubber. India-rubber in the native state may unquestionably be used in a certain proportion as an ingredient of the compound, but the main feature of the invention is to prepare old vulcanized rubber, with or without foreign articles, for a second use by means of moulds or dies. Heat generated by steam is applied, whether the substance is rubber in the native state, or rubber with the substances commonly used in vulcanizing the same ; but the patentee in the original patent proceeded to say that the rubber or compound, while thus heated, is pressed into moulds or dies, which give it the desired form, and that the steam is conducted around all portions of the moulds or dies which come in contact with the rubber or compound.

Enough is also found in the specification of the reissued patent to lead to the same conclusion. Prior to the invention, as the patentee in the new patent states, the value of vulcanized rubber ceased when the article as manufactured was worn out, or had served the purpose for which it was prepared, as it could not be worked over or used a second time. Beyond doubt the next succeeding paragraph of the specification gives some support to the indefinite and unlimited construction assumed by the complainants ; but it is clear, if that view is adopted, that the reissued patent would be void in having been granted for a different invention from that described in the original specification. Satisfactory explanation to the contrary, however, is found in the latter clause of the same paragraph, in which it is said that many foreign substances may be intermixed with the ordinary rubber compound, whether already once vulcanized or newly compounded for vulcanization ; and the succeeding paragraph shows, even more conclusively, what the actual invention is, and that the patentee never pretended to embrace any of the improvements made by the great inventor in this department of the useful arts. Many foreign substances, he says, may be intermixed so as to form an article having the valuable properties of vulcanized rubber compound, although composed in a great part of cheaper materials ; and he then

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proceeds to say, that the principal features of his process consist in applying heat, by means of steam, to rubber mixed with substances commonly used in vulcanizing rubber, or to rubber compound which has once been vulcanized, either with or without the addition of fresh rubber, the rubber or compound while thus heated being pressed into moulds or dies of the desired form, and the steam being introduced into steam chambers or jackets, and thereby conducted around the moulds or dies which come in contact with the compound. Pressure of some sort is doubtless necessary in order that the compound may be forced into all parts of the mould or die, and that the material or manufacture may be made smooth and uniform. Objection is made that the word "blisters" is not used in the original patent; but the objection is without merit, as the process and the purpose are plainly suggested and easily understood. Steam-jackets are not named in the original patent; but the language employed is scarcely less suggestive, and fully justifies the action of the commissioner, in granting the reissued patent. Mention should be made that the patentee describes the respective ingredients to be used in preparing rubber in its natural state, as well as for conducting the process of revulcanization, or for working it over a second time; but it is unnecessary to dwell upon that topic, as the patentee states, in express terms, that he does not claim any peculiar compound, or any particular arrangement of machinery, as that part of the invention does not consist in a new composition of matter, nor in a new machine, and he must abide by that disclaimer. Appended to that is another statement which deserves a passing notice, as the representation, if embodied in a claim, would render the claim void, unless it could be limited to such compounds as those described in the specification. He states that the process is applicable to all compounds by means of suitable apparatus; but it is clear that the original patentee never set up any such claim, and if he had, it could not be sustained as it may be that other compounds, not now known, may yet be discovered, which will prove to be vulcanizable. *Goodyear v. Providence Rubber Co.*, 2 Cliff. 275.

Viewed in the light of those explanations, as the specification must be, it is quite clear that the patentee intends to use the

compound for vulcanizing rubber, whether old rubber or native rubber, and whether used with or without foreign articles, together with the application of a high degree of heat as the primary means of vulcanization or revulcanization, and that the compound is composed substantially of the same ingredients and in substantially the same proportions as those described in the specification of the great inventor of that improvement.

Beyond question, the inventor in the case before the court intended to use substantially the same ingredients as the primary means of vulcanization or revulcanization; but he admits that those means are public property, and he does not profess to describe anything of the kind as a part of his invention. Subject to these explanations and qualifications, he proceeds to say that the first part of his invention relates to moulding the compound used, and consists in the use of a mould which is heated by steam before the compound is placed in it, or before the pressure is applied for moulding it, the other portion of the mould or die being also heated by steam and brought into its place with force sufficient to cause the compound, which is softened by the heat, to completely fill the mould, and he states that that part of the invention is especially useful when a compound is used which contains a portion of old vulcanized rubber. Immediately following, and without any intervening explanation, is the equally explicit statement as to the second part of the invention, which the patentee says relates to the application of the heat necessary for curing the compound, and "consists in applying it by means of steam in steam-chambers or steam-jackets, the heat of the steam being conducted by the walls of the steam-chamber or steam-jacket which comes in contact with it." Carefully examined, it will be seen that the second claim of the patentee is for the mode described in applying heat by means of steam in steam-chambers or steam-jackets, and also the mode of conducting it to the compound by the walls of the steam-chamber or steam-jacket. He does not claim to be the discoverer that heat will cure the compound, nor even the ingredients of the compound, as those matters were discovered by an antecedent inventor. External pressure is generally necessary to some extent, and the third part of the invention, as the patentee states,

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consists in applying the necessary heat to the compound while under pressure, either external or such as is produced by the expansion of the compound when confined in the moulds.

These claims are repeated at the close of the specification ; but it is unnecessary to give them much separate examination, except to say that they must receive the same construction as that given to the claims mentioned in the body of the specification. Suppose that it is so, still the respondents insist that the art of placing such compound or compounds in moulds or between metallic surfaces or dies, and then applying heat and moulding the same into the desired form either in large chambers or ovens filled with steam of the proper temperature, was well known and used before the invention was made by the original patentee in this case. They also allege in their answer, that the art of smoothing the surfaces of goods by means of steam contained within the walls or chambers formed in rollers or dies, was also known and used before the date of that invention. Remarks respecting the invention of Charles Goodyear are unnecessary, as it has already been shown that the letters-patent in this case when properly construed, do not describe the invention of the patentee as embracing anything which was patented to the former inventor. Brief reference only need be made to the patent of Thomas Hancock, as it is evident that the invention differs widely from that of the complainants in the case before the court. His moulds were different, as he employed the steam-boiler process, and not the mould surrounded by steam-chambers, as described in the complainants' patent. He formed the article in the mould before he applied heat, and in order to prevent the compound from adhering to the mould, he employed silicate or magnesia, and applied the same either to the inner surface of the mould, or to the article as formed of the compound, and in many cases he removed the article from the mould before it was vulcanized. None of the mechanism employed by the original patentee in this case is described in the specification of the Hancock patent. All that need be said respecting the patent of Samuel Lord and that of John Smith is, that the patent granted to the former was for an improvement in pressing whole pieces of woollen cloth, and that of the latter was for the construction



of moulds heated by steam or otherwise for shaping the brims of hats, and that they are not of a character, in the opinion of the court, to supersede the invention secured in the reissued letters-patent of the complainants. Such part of the invention of the complainants described in the letters-patent as consists in the means of constructing the mould, or of modifying the pressure upon the material while the heat is being applied for the purpose of vulcanization, is substantially admitted to be new and useful within the meaning of the patent law, and the court is of the opinion that each of the three claims, if properly construed and limited as herein described, is valid.

Discussion of the objection taken in argument that the alleged improvement, as described in the specification, is not patentable, may well be omitted, as the remarks of the court already made in defining the invention show that the defence cannot be sustained.

Grant that the construction of the patent adopted by the court is correct, and it follows that the charge of infringement to a certain extent is admitted; and the correct practice where infringement to any extent is admitted, if the patent is held to be valid, is to enter an interlocutory decree for the complainant, and send the cause to a master to ascertain the amount which the complainant is entitled to recover. Such gains and profits only as were made by the respondent in the unlawful use of the invention could be recovered by the complainant in an equity suit, prosecuted under the repealed patent act, as appears by several decisions. *Livingston v. Woodworth*, 15 How. 558; *Rubber Co. v. Goodyear*, 9 Wall. 804. Different rules, however, are enacted in the new patent act, which provides that the complainant, when a decree is rendered in a suit in equity for an infringement, shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby, and the further provision is, that the court shall assess the same or cause the same to be assessed in its discretion, and that the court shall have the same discretionary power to increase the damages as that given by the act where the damages are found by a verdict in an action on the case. 16 Stat. at Large, 206.

Profits are to be accounted for by the respondent in every such



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suit, whenever a decretal order to that effect is rendered against the respondent for an infringement, and if it appears that the injuries which the complainant sustained by the infringement are greater than the gains and profits realized by the respondent in making and using the invention, and vending it to others to be used as estimated and assessed, then the complainant is entitled to recover compensation for the excess of the injuries sustained, beyond the amount estimated and assessed for the gain and profits received by the respondent. Actual damages for the injuries sustained by the complainant beyond the amount estimated and allowed for the gains and profits made by the respondent, must be assessed in the first instance; but the court in its discretion may increase the amount so allowed to any sum according to the circumstances, not exceeding three times the amount estimated and assessed as the actual damages sustained beyond the gains and profits realized by the respondent. Prior acts and parts of acts set forth in the schedule of acts annexed to the last section of the new act are declared by the first clause of that section to be repealed; but the next clause of the same section provides that the repeal enacted shall not affect, impair, or take away any right existing under any of said laws. Pending actions are in terms saved from all the consequences of the repeal; and the further provision is that all actions and causes of action, both in law and in equity, which have arisen under any of said laws "may be commenced and prosecuted to final judgment and execution in the same manner as though this act had not been passed," excepting that the remedial provisions of the act shall be applicable to such causes of action if commenced and prosecuted subsequent to the passage of the new act. 16 Stat. at Large, 216. Damages for the infringement of letters-patent, where the wrongful acts were committed by the respondent subsequent to the passage of that act may, in certain cases, be recovered by the complainant in an equity suit, beyond the gains and profits made by the wrong-doer; but it is clear that the case before the court is not of that character, as fully appears by the allegations of the bill of complaint.

Decree for complainants, to be framed in conformity to the opinion of the court.

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The Equitable Safety Insurance Company v. Dunham.]

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THE EQUITABLE SAFETY INSURANCE COMPANY, *Respondents and Appellants*, v. THOMAS DUNHAM, *Libellant*.

BEFORE CLIFFORD AND SHEPLEY, JJ.

CLIFFORD, J. Appeal in admiralty from a decree of the District Court in a cause of contract. Like the case, *N. E. Mut. Mar. Ins. Co. v. Dunham* [*ante* p. 332], the matters in controversy were submitted to the court upon an agreed statement of facts.

Reference to the record will show that all the questions involved in the pleadings are the same as those just decided in the other case, and the evidence adduced is also the same, so that the decision in that case controls the rights of the parties in this case.

Decree affirmed with costs.

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MAY TERM, 1871.

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HIRAM LITTLEFIELD, *Petitioner*, v. DELAWARE AND HUDSON CANAL COMPANY.

BEFORE CLIFFORD AND SHEPLEY, JJ.

Under § 2 of the Bankrupt Act, which provides that "the Circuit Court within and for the district where the proceedings shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act," a petition for a revision of the decree of the District Court refusing a discharge, may be entertained, although such decree was a final one, and no proceedings were actually pending the District Court when the petition for revision was made.

The word "pending" does not mean that the Circuit Court can take jurisdiction of a petition for revision only while proceedings are actually pending, and before a final decree, in the District Court.

Discharge by a final decree was refused an alleged bankrupt in the District Court, May 12, and his petition for revision was filed in the Circuit Court, June 30 following.

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*Held*, there was no ground, in the absence of a rule limiting the time in which such petitions should be filed, to deprive the petitioner of a rehearing on account of delay.

An allegation, in a petition to the Circuit Court under § 2 of the Bankrupt Act, for revision, that he has conformed to the provisions of the act and is aggrieved because the prayer of his petition for discharge was refused, is not sufficient.

The petition for revision must state in what the error consists, whether it be of law or fact; and the nature of the alleged error should be distinctly stated for the information of the appellate court and as notice to the opposite party.

THIS was a petition by an alleged bankrupt for revision of a final decree of the District Court refusing him a discharge from his debts under his original application. The opinion contains a statement of facts, and of the form of the petition for revision, sufficient to an understanding of the questions involved in the case.

*J. C. Perkins*, for petitioner.

*Caleb Lamson*, for respondents.

CLIFFORD, J. Leave to amend the petition was asked and granted in this case before the parties were heard upon the issues involved in the pleadings. As amended the allegations of the petition are, that the petitioner has conformed in all respects to the provisions of the Bankrupt Act, and that he, the petitioner, verily believes that he is entitled to a certificate of discharge from all his debts provable under that act, and that he is aggrieved by the refusal of the District Court to grant him such a discharge. Therefore he prays that he may have a hearing in this court upon the matter of his discharge, and that the decision of the District Court refusing the same may be reviewed and reversed, and that a discharge may be granted to him pursuant to his petition. Order of notice was granted on the petition for review filed in this court, and on the return day named in the order the creditors named in the petition appeared and demurred to the petition, showing the following causes of demurrer:—

1. That the petitioner has not prayed for any relief.
2. That he has not specified what further proceedings, if any, are desired in his case.
3. That he does not allege that there was, at the time he filed his petition in this court, any matter pending in the District Court to which his petition could apply.
4. That the rights of the respondents as creditors to hold and dispose of their

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claims, and maintain an action at law on the same against the petitioner, had, before he filed his petition in this court, vested in them under and by virtue of the decision and judgment of the District Court, that he was not entitled to a discharge from his debts. 5. That the petitioner was guilty of unreasonable delay in filing his petition. 6. That the Circuit Court has no jurisdiction of the petition to revise the decision and judgment of the District Court refusing to grant to the petitioner a certificate of discharge from his debts under the Bankrupt Act.

Remarks in respect to the first and second causes of demurrer are unnecessary, as they are obviated by the amendment filed by leave of court, which prays that he may be decreed by the court to have a full discharge from all his debts provable under the Bankrupt Act, and that a certificate thereof may be granted to him as therein provided.

Evidently there is no merit in the third cause of demurrer, as there could not be any ground of complaint before the decision of the District Court was rendered. Had the petition been filed before the decision was rendered, the decisive answer to it would have been that it was premature, and if it cannot be filed afterward, then the provision is nugatory, which cannot be admitted. By § 2 of the Bankrupt Act it is enacted "that the Circuit Court within and for the district where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act."

Reliance is placed upon the word "pending" as giving support to the proposition that it is only while the proceedings are actually pending in the District Court, that the Circuit Court can take jurisdiction of a petition like the one under consideration. Interlocutory orders, it is conceded, may be revised, but the argument is, that a final decree terminates the appellate jurisdiction of the Circuit Court, as the matter from that moment ceases to be pending in the District Court. Matters involved in a final hearing can only be disposed of by a final decree, and if they cannot be revised after they have been disposed of in the District Court, then they cannot be revised at all, as it is clear that the orders

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and decrees of a subordinate court cannot be revised before they are made. Manifestly the construction assumed by the respondent is one which cannot be sustained, as it would defeat the obvious intention of Congress, which was to subject every ruling order and decree of the District Court in such cases to the re-examination and revision of the Circuit Court, nor is it necessary to adopt that view in order to give full effect to every word of the section. Jurisdiction is conferred upon the Circuit Court within the district where the proceedings shall be pending, but the meaning of Congress in employing that language was to describe the particular Circuit Court in which the jurisdiction should be exercised, and not the state of the matters to be revised, as it is clearly the intention of Congress that all such matters should be subject to revision in the Circuit Court, whether interlocutory or final. Revision must be sought in the Circuit Court of the district where the proceeding took place which the petitioner asks to have revised, but he is not deprived of a remedy, because the decree is in its nature final.

*In re Reed*, 2 B. R. 2; *Ruddick v. Billings*, 3 B. R. 14.

The power of Congress to pass the Bankrupt Act is not questioned, and it is equally clear that Congress may create a special tribunal to execute it, or may confer that jurisdiction upon the District and Circuit Courts created by the Judiciary Act. Decrees of the District Courts are final in the constitutional sense, although they are rendered under an act of Congress which makes them subject to revision by the Circuit Court, and consequently the right of such revision is not inconsistent with the interest which the opposite party acquires in the decree. Rendered, the decree is, subject to legal revision in the Circuit Court, no party acquires or can acquire any interest in the decree to defeat the right of such revision. Argument upon this topic is unnecessary, as the final judgments and decrees of every subordinate court are rendered subject to re-examination and revision upon due proceedings in the court of paramount jurisdiction.

Unreasonable delay in filing the petition for revision is the next objection. Authority to apply for such a revision is conferred by the act of Congress, and it prescribes no limitation as

to the time within which the application must be made. Rules and regulations were adopted by the Supreme Court, but they do not prescribe any such limitation, nor has any such been adopted by this court. The discharge was decreed on the 12th of May, 1869, and the petition was filed on the 30th of June in the same year. Special injury is neither alleged nor proved, and the court is of the opinion, in view of all the circumstances, that the petition ought not to be rejected because it was not filed at an earlier day. Until some rule is adopted upon the subject, the court will not deprive the petitioner of a hearing on that ground unless the delay is manifestly unreasonable or has operated to the prejudice of the respondent.

Want of jurisdiction is the remaining objection alleged as a cause of demurrer; but the point is without merit, as the jurisdiction is conferred in language too plain to be misunderstood.

Neither of the alleged causes of demurrer, therefore, can be sustained; but the petition, upon another ground, is clearly insufficient. Objections available under a general demurrer are still open to the respondent, as every special demurrer is also a general demurrer, and it is a universal rule that a demurrer, whether special or general, admits only what is well pleaded. All that the petitioner alleges is that he has conformed in all respects to the provisions of the Bankrupt Act, and that he verily believes that he is entitled to a discharge from his debts. Based upon those allegations, he states that he is aggrieved by the refusal of the District Court to grant him a certificate to that effect. Appeals in equity suits and in causes of admiralty and maritime jurisdiction vacate the respective decrees in the subordinate courts, and remove the whole record in the court of paramount jurisdiction; but nothing of the kind is done in a proceeding by petition under the second section of the Bankrupt Act. An allegation merely that a party has conformed to the provisions of the Bankrupt Act, and that he is aggrieved because the prayer of his petition has been refused, is not sufficient. Nor is the allegation by a petitioner that he is aggrieved sufficient unless it be also alleged in what the error consists, whether of law or

vised in the Circuit Court, but it was not the intention  
gress, in this form of proceeding, to give a party a sec  
merely as such, but to secure to him an appellate tribuna  
re-examination and revision of rulings, orders, and de  
the District Courts, and for the reversal of the same  
they are found to be erroneous.

Demurrer sustained.

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JOSEPH M. DAY v. JAMES BUFFINTON.

BEFORE CLIFFORD AND LOWELL, JJ.

The salary of a judge of a court of record, payable out of the treasury of a  
legally taxable, as income under the internal revenue laws of the United  
government of the United States having no power under the Constitution

THIS was an action of contract to recover the amount  
assessed under the internal revenue laws of the United  
upon the plaintiff's salary as judge of probate and in  
for the County of Barnstable, in the commonwealth of  
chusetts.

It was argued before Clifford and Lowell, JJ., at the  
term, 1869, upon the following agreed facts: "That the  
was, during the years 1866 and 1867, a judicial officer



stable is within said First Congressional District. That in said years 1866 and 1867, the United States Assessor of Internal Revenue for said First Congressional District, against the written protests of the plaintiff, made before assessment, assessed upon his salary as judge, as aforesaid, taxes amounting in all to \$61.51. That against the written protests of the plaintiff, before collection thereof, delivered to the defendant, the defendant collected said taxes of the plaintiff. That the plaintiff's salary as judge, as aforesaid, is fixed by law, and is payable out of the treasury of said Commonwealth, and that the plaintiff has in all respects complied with the provisions of the revenue laws of the United States prescribing the conditions under which actions may be brought for the recovery of taxes illegally assessed under said laws."

*Dwight Foster*, for the plaintiff.

The question before the court is whether the salary of a judge of a court of record, payable out of the treasury of the State of Massachusetts, is legally taxable as income under the internal revenue laws of the United States.

"The powers of the general government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties acting separately and independently of each other within their respective spheres." *Ableman v. Booth*, 21 How. 516. The sphere of action appropriated to each is as far beyond the reach of the other "as if the line of division was traced by landmarks and monuments visible to the eye. . . . Each is sovereign and independent in its sphere of action, and exempt from the interference or control of the other either in the means employed or functions exercised." *Bank of Commerce v. New York City*, 2 Black. 635. "The people of each State compose a state having its own government and endowed with all the functions essential to separate and independent existence. In many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized." *Lane Co. v. Oregon*, 7 Wall. 76. "That the power to tax involves the power to destroy; that

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the power to destroy may defeat and render useless the power to create ; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, . . . are propositions not to be denied.” *McCulloch v. Maryland*, 4 Wheat. 430. “The right of taxation when it exists is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy.” *Austin v. The Alderman*, 7 Wall. 699.

The precise converse of the question now under discussion was decided in *Dobbins v. Commissioners of Erie Co.*, 16 Pet. 435. There, under a law of the State of Pennsylvania, a tax was imposed on “the emoluments of the office” of the captain of a United States revenue cutter. It was said by the court to be “levied on a valuation of the income of the office.” Page 445. And it was held that this could not be done constitutionally.

The general principles relied upon in the present cause are affirmed in an unbroken series of adjudications commencing, half a century ago, with *McCulloch v. Maryland*, 4 Wheat. 316, and coming down to *Society for Savings v. Coite*, 6 Wall. 594, and other cases in the same volume, in which the opinions of the court were delivered by Mr. Justice Clifford: see also *Weston v. Charleston*, 2 Pet. 449; *Bank Tax Case*, 2 Wall. 200; *Van Allen v. Assessors*, 3 Wall. 573. It is clearly established by *Weston v. Charleston*, and *Dobbin v. Commissioners of Erie Co* that no valid distinction can be drawn between the taxation of an office itself *eo nomine* and the taxation in a general assessment upon incomes of the salary or emoluments of an office, which are the legal compensation for the performance of official duties, and are presumed to be only such adequate remuneration as is requisite to secure the services of a competent incumbent. In each case it is held to be a fatal objection to the power to lay such a tax; that if admitted to exist at all there can be no limit to the extent to which the imposition may be carried. The office taxed exists only at the mercy of the taxing power. In the cases heretofore decided by the Supreme Court of the United States, the taxes adjudged invalid have been imposed by State legislation upon instrumentalities of the Federal government,

and there has existed an additional obstacle in the fact that the Federal government is declared by the Constitution to be supreme within its sphere of action. But this has been adverted to and relied upon by the court only as a cumulative argument, and by no means as the principal or essential foundation of the decisions which have been made.

The right of the State to exist as a body politic, to have a government with executive, legislative and judicial departments, to have State offices filled and their duties performed, does not depend upon the will or forbearance of Congress. But if State offices or their emoluments are taxable at all by the Federal government, that taxation may be carried to the point of destruction. To admit the principle is to admit the power of Congress to tax every State government out of existence.

The act of Congress (July 1, 1862, 12 U. S. Stat. 483) which required stamps to be affixed to writs and other original processes in courts of record was held by the highest tribunals of several States to be unconstitutional in its application to State courts. *Warren v. Paul*, 22 Ind. 276. *Union Bank v. Hill*, 3 Cald. (Tenn.), 325; *Jones v. Keep*, 19 Wis. 369; *Fifield v. Close*, 15 Mich. 505. And this provision was repealed by Congress soon after these decisions were published. It is believed that the reasoning of these respectable authorities will be found to be fully applicable to the case at bar. See also *Carpenter v. Snelling*, 97 Mass. 452.

In the case at bar there is no attempt to impugn the constitutionality of an act of Congress. We are dealing only with a question of construction. The court is merely called upon to limit the application of general language by excluding from its operation a description of income, which there is no reason to believe that Congress intended to embrace. The internal revenue laws do not in terms impose any tax on State offices, or their emoluments, or the income derived therefrom; and, considering the well-settled and universally known principles of constitutional law on this subject, it is fair to conclude that if such an intention had existed it would have been expressed in special and explicit provisions of the act. *United States v. Coombs*,

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12 Pet. 72. "General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore be presumed that the legislature intended exceptions to its language, which would avoid results of this character." *United States v. Kirby*, 7 Wall. 486.

*John C. Ropes*, for the defendant.

By § 8 of the first article of the Constitution of the United States, it is provided, that "Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." In pursuance of this provision of the Constitution, the statutes of the 30th of June, 1864, of the 3d of March, 1865, and the 2d of March, 1867, were passed by the Thirty-Eighth and Thirty-Ninth Congresses. 13 Stat. at Large, 281 (§ 116), 479 (§ 1); 14 Stat. at Large, 137 (§ 9), 477 (§ 13). These statutes impose a tax of five *per centum* on the gains, profits, and income of every person residing in the United States, derived from any source whatever. Under these statutes the plaintiff was assessed upon his salary, as judge of probate, paid him by the State of Massachusetts. This tax he seeks to recover back in this action.

The question is, whether the United States government can lawfully impose a tax upon a salary paid by a State to an officer of that State.

I. It is obvious, in the first place, that the Constitution and the statutes make out a *prima facie* case for the government. The only limitation imposed in terms by the Constitution on the general power of taxation is, that the taxes shall be uniform throughout the country. That this limitation has been duly observed in laying the tax in question is not denied.

II. But it is urged that there is an implied limitation to the power of taxation granted by the Constitution, namely, that it shall not be so exercised as to destroy or even impair the (so-called) sovereignty of the States, or in any way injuriously to affect the State governments; and further, that this tax, if assessed upon State officials, is in direct conflict with this limitation, and is therefore unconstitutional.

1. We deny that there is any such implied limitation.

There is no *necessary* implication of this nature growing out of the relations of the States to the Federal government. The same people that through the Federal government lay the tax in question, establish, in the different States, the officers and the institutions upon the income and gains of which the tax is assessed. The tax thus imposed by the people of all the States, acting through their Representatives in Congress, is uniform throughout all the States. Taxation and representation go together. There is an implied limitation on the power of a State to tax, however, in that a State cannot tax the institutions and officers of the Federal government. Here there is necessarily to be implied a restriction on the power of the States, for such taxes are not uniform or equal throughout the country; nor are they imposed by the same power which creates the offices and institutions taxed; and they render it possible for one State to hinder and obstruct the workings of the superior and independent sovereignty of the United States. *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. United States Bank*, 9 Wheat. 738; *Weston v. Charleston*, 2 Pet. 449; *Dobbin v. Commissioners of Erie Co.*, 16 Pet. 435; Story on the Const., § 1053; Cooley's Const. Limit., 479–481; *Bank of Commerce v. New York City*, 2 Black, 620; 1 Kent's Com., 425–429; *Bank Tax Case*, 2 Wall. 200.

The claim that the banks, offices of trust and profit, bonds, etc. of the State governments are, by the converse application of the principles laid down in the cases cited above, exempted from taxation by the United States government, is not tenable. The result would be to exempt from Federal taxation an enormous amount of property; for not only would State bonds be exempt, but also all railroad and other bonds guaranteed by States, all bonds of municipal corporations,—the creatures of the State governments,—and, in fact, it is difficult to say where the line could be drawn. The power of taxation granted by the Constitution to the general government would in great measure be rendered nugatory.

To support this enormous claim of exemption from national

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taxes, it is urged that "the States are to exist with independent powers and institutions within their spheres," just as "the Federal government is to exist with independent powers and institutions within its sphere"; and that, consequently, the Federal government cannot tax the agencies and instruments used by the States to carry on government within their own proper spheres.

See remarks of Marshall, C. J., in *McCulloch v. Maryland*, 4 Wheat. 429, 436; *Warren v. Paul*, 22 Ind. 279; *Berney v. Tax-Collector*, 2 Bailey, So. Car. 654; see also *Bank of Commerce v. Commissioners of Taxes*, etc., 23 N. Y. 192, reversed in 2 Black, 620; *Fifield v. Close*, 15 Mich. 509. But this is mere theory, not law. The real and only subject for inquiry in such cases is, not whether the person or thing affected is part and parcel of the machinery of a State government, but whether the Federal government is acting under one of its enumerated (or necessarily implied) powers. Thus, if a State bank or railroad is taxed, the question is, not whether these institutions are part of the fiscal machinery of the State, but whether the Constitution gives to the Federal government the power of taxation. So, if the United States take, for instance, a State jail under the right of eminent domain, the question is, not whether the property taken is part of the apparatus of the State for the prevention of crime, but whether the right of eminent domain belongs to the Federal government. This is the only rule absolutely free from embarrassment in its application, and the only rule proper to be observed in investigating the extent of the sovereign powers granted to the general government. If the act done is within the scope of one of these sovereign powers, there is in law, and can be, no limitation in its exercise. The extent to which it shall be exercised rests entirely in the discretion of Congress.

If the foregoing views are sound, all the persons in the United States, whoever they may be; all the property in the United States, to whomsoever it may belong and however acquired; all the offices and all the officers of the State governments; all the State banks and all the State securities,—are subject abso-

lutely to the discretion of Congress in the exercise of the general power of taxation vested in the Federal government. *Howell v. Maryland*, 3 Gill. 14; *Jones v. Keep*, 19 Wisc. 369, 381, besides the cases before cited.

No implied restriction on the power of the government arises in law from the fact that the power of taxation granted by the Constitution to the Federal government may be so wielded as to injure or even destroy the State government.

Such risks are always taken when a general government is established; as, for instance, when the people of Massachusetts, inhabitants of towns and cities, established, in 1780, a State government, with powers similarly liable to effect, by their abuse, the virtual destruction of municipal government. See remarks of Marshall, C. J., in *McCulloch v. Maryland*, 4 Wheat. 428; and in *Providence Bank v. Billings*, 4 Pet. 515, 562, 563. The only safety against the abuse of this power to the injury of the State governments is in the discretion of Congress, and especially in the fact that the people of the States and the people of the United States are one and the same people. There is no more danger of the abuse of the power of taxation by the general government than of the abuse of the other great powers given to it, such as the power to raise and maintain armies, to call out the militia, to make treaties, or even the implied right of eminent domain. The discretionary power in any government must be vested somewhere. In our government it is vested in the United States. Constitution, Art. VI.

2. But if the court shall be of opinion that there is such a limitation to the taxing power of the Federal government, as that it shall not be exercised so as to destroy or even impair the (so-called) sovereignty of the States, or in any way injuriously to affect the State governments, then we deny that the tax in question in this suit conflicts with that limitation either theoretically or practically.

The tax in question is a general income tax, affecting the income of probate judges only incidentally, and not aimed at the office. Even supposing that State offices and officers should be held exempted from Federal taxation by a converse application



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of the principles laid down in *Dobbins v. Commissioners*, etc., 1 Pet. 435, yet that does not settle this case. It has never been decided that a State may not lawfully tax the *income* of an officer of the general government. Such a tax has been considered in *Weston v. Charleston*, 2 Pet. 449, 483; and in *Melcher v. Boston*, 9 Met. 77. See also the opinion of the Court of Appeals of New York in *Bank of Commerce v. Commissioners*, 23 N. Y. 192 and the arguments of counsel and opinions in *Berney v. Tax Collector*, 2 Bailey, So. Car. 654. We claim, then, that theoretically the tax in question does not conflict with the exercise by State of all its lawful powers.

But practically the case presents no difficulty whatever. The incomes of all United States officers, except the President and the judges of the Supreme Court, are taxed to the same extent as are the incomes of all State officers. It is impossible for the court to say that such a tax, so uniform and so indiscriminate, is, in any intelligible and legal sense, calculated to impair the exercise of the constitutional powers of the States.

*Foster*, in reply.

Two propositions are undeniable: first, that, within the sphere of their jurisdiction, the States are just as independent of the Federal government as the government, within its sphere, is independent of the States.

Second, that a government, the processes and instrumentalities of which are liable to taxation by another sovereignty, cannot be in any sense independent of it.

These two propositions cover the case.

The defendant's argument in effect concedes that when one government has the power to tax another, the one liable to be taxed must necessarily be subject and subordinate to the one which has the power to tax. According to his theory we do not live under a complex system of State and Federal governments each independent within its sphere, but the continued existence of the States depends on the moderation and forbearance of the United States in the exercise of its taxing powers. This cannot be.

CLIFFORD, J. Taxes were assessed against the plaintiff under

the internal revenue laws of the United States upon his salary as judge of probate and insolvency for the county of Barnstable in this State for the years 1866 and 1867, and, having paid the same under protest, he brought an action of assumpsit against the defendant as the collector of such taxes for the first collection district, to recover back the amount so paid, both assessments amounting to the sum of \$61.50. The agreed statement shows that the salary of the plaintiff as such judge is fixed by law, and that it is payable out of the treasury of the State, and that he made due protest before the taxes were assessed and at the time he made the payments.

Five *per centum* on the excess over \$600, and not exceeding \$5,000, was required to be levied, collected, and paid annually by the act of the 30th of June, 1864, as amended by the act of the 3d of March, 1865, upon the annual gains, profits, and income of every person residing in the United States . . . . whether derived from any kind of property, rents, interests, dividends, or salaries, or from any profession, trade, employment, or vocation . . . . or from any other source whatever. 13 Stat. at Large, 281, § 116; as amended, Ibid. 479, § 1. The first assessment was made under that provision, and the second was made under a provision in all respects similar, except that the exemption was \$1,000 instead of \$600, as in the former act. 14 Stat. at Large, 477, § 13. Power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare of the United States, is conferred by the Constitution, and the only limitation annexed in terms to that clause of the instrument is that all duties, imposts, and excises shall be uniform throughout the United States. But the powers granted to Congress are not in all cases exclusive of similar powers existing in the States, unless where the Constitution has so provided, or the exercise of a like power is prohibited to the States, or there would be a direct or necessarily implied repugnancy in the exercise of it by the States. Exclusive authority over all places purchased by the consent of the legislature of the State, in which the same shall be, for the erection of forts, magazines, dockyards, and other needful buildings, is delegated to Congress, and it fol-

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lows as a necessary consequence that the State legislatures cannot exercise any power or jurisdiction over such places, as the exclusive authority over them is vested in the national government. State authorities cannot coin money, emit bills of credit, or make anything but gold and silver a tender in payment of debts, as they are prohibited from so doing by the Constitution, nor shall any State without the consent of the Congress lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws. Constitution, Art. I. § 10. Laws establishing rules of naturalization are required to be uniform, and it is held that the power to pass such laws is vested exclusively in Congress, as the exercise of such a power by the States would be incompatible with that condition as annexed to the exercise of that power. *Houston v. Moore*, 5 Wheat. 23; *Chirac v. Chirac*, 2 Wheat. 259.

Cases arise where it is held that the mere grant of power to Congress, unaccompanied by any legislation under the grant, does not imply a prohibition on the States to exercise the same power. Such cases, however, are not numerous, and whenever the nature of the power granted or the terms in which the grant is made are of a character to show that the framers of the Constitution intended that it should be exclusively exercised by Congress, the subject is as completely taken from the State legislatures as if the Constitution contained an express prohibition to that effect. *Sturges v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 Wheat. 213. Undoubtedly the power of Congress to lay and collect taxes, duties, imposts, and excises is coextensive with the territory of the United States, but when properly construed it does not interfere with the power of the States to levy taxes for the support of their own governments, nor is the exercise of that power by the States an exercise of any portion of the power that is granted to the Federal government. *Loughborough v. Blake*, 5 Wheat. 317; *Gibbons v. Ogden*, 9 Wheat. 1; *Waring v. The Mayor*, 8 Wall. 121. State power to lay and collect taxes, for the support of their government, may reach every subject over which the sovereign power of the States extends. They cannot tax imports nor exports without the consent of

Congress, as they are prohibited from so doing by the Constitution. Want of authority in the States to tax the securities of the United States issued in the exercise of the admitted power of Congress to borrow money on the credit of the United States is equally certain, although there is no prohibition in the Constitution establishing any such rule. *Hamilton Co. v. Massachusetts*, 6 Wall. 639; *Society for Savings v. Coite*, 6 Wall. 594.

All subjects over which the sovereign power of a State extends are as a general rule proper objects of taxation, but the power of a State of the Union to lay taxes does not extend to the instruments of the national government, nor to the constitutional means employed by Congress to carry into execution the powers conferred in the Federal Constitution. Tax laws of the States cannot restrain the action of the national government, nor can they abridge the operation of any law which Congress may constitutionally pass. They may extend to every object of value within the sovereignty of the State belonging to the citizens, but they cannot reach the instruments and means of the Federal government, nor the administration of justice in the Federal courts, nor the collection of the public revenues, nor interfere with any constitutional regulation enacted by Congress. *McCulloch v. Maryland*, 4 Wheat. 429; *Brown v. Maryland*, 12 Wheat. 448.

Power to tax its citizens or subjects in some form is an attribute of every government, residing in it as part of itself, and hence it follows that the power to tax may be exercised at the same time upon the same objects of private property by the State and by the United States without inconsistency or repugnancy. *Society for Savings v. Coite*, 6 Wall. 606; *Prov. Bank v. Billings et al.*, 4 Pet. 563. Such power exists in the State as one conferred or not prohibited by the State constitution, and in the Federal government under an express grant. Such powers are therefore perfectly consistent, though the two governments, in exercising the same, act entirely independent of each other, as applied to the property of the citizens.

Congress in its discretion fixes by law the compensation to be allowed to Federal officers; and having exercised that discretion,

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and fixed the amount of compensation, the law of Congress confers upon the officer the right to receive that amount when he has performed the duties devolved upon the office; and the settled rule of decision in the Supreme Court is that any law of a State imposing a tax upon such an office diminishing the recompense allowed to such officer is in conflict with the law of Congress which defines and secures to the officer the prescribed compensation. *Dobbins v. Commissioners*, 16 Pet. 447.

Taxation by the States of the kind mentioned is declared to be unconstitutional, because the exercise of such a power is an appropriation of the revenue, levied and collected to pay the debts and provide for the common defence and general welfare of the United States, to the support of the State government, and because the levying and collection of such taxes constitute a direct interference with the means provided by Congress to carry into effect every power granted in the Constitution. Prior to the date of that decision the Supreme Court had decided that the States could not tax the public securities without the consent of Congress, nor levy any tax upon imports, and the court was equally unanimous and decisive in opinion that a State law imposing a tax upon the salary of a Federal officer was unconstitutional and void. *McCulloch v. Maryland*, 4 Wheat. 429; *Weston v. Charleston*, 2 Pet. 449; *Osborn v. U. S. Bank*, 9 Wheat. 738.

The argument for the plaintiff is, that the converse of the proposition is equally true that a law of Congress taxing the salary of a State officer is equally unauthorized as an appropriation of the revenue raised by the legislature to defray the necessary expenses of the State, and that it is equally unwarranted as an unauthorized interference with the operations of the State governments. Perfect concurrence in the rule exempting the salary of the Federal officer from taxation by the States is expressed by the defendant, but he denies that the converse of that proposition has any foundation whatever. Federal officers and the instruments and means of the Federal government, it is conceded, are exempt from State taxation, but it is denied that the Federal government is subject to any such implied prohibition, even in the case

before the court, because the tax in question, it is argued, is imposed by the same people who established the offices and institutions in the States which are subjected to the burden of the controverted tax. Suppose the tax in question is imposed in the constitutional sense by the same power as that which created the offices and institutions subjected to the payment of the same, still it is not perceived that the concession advances the argument, unless it be assumed that the offices and institutions subjected to the burden imposed are under the control of the power imposing the tax, which is the precise question in controversy between the parties. Disguised as it may be, the theory of the defendant is that the law imposing the tax is valid, because Congress in enacting the law imposing it exercised a paramount power over the revenues of the State raised and appropriated for the purposes declared in the agreed statement.

The proposition of the defendant is in substance and effect that the States cannot tax the instruments and means of the government of the United States, because the Federal government is supreme, but that the latter may tax the instruments and means of the State governments, because, as he assumes, the States are subordinate to the United States in the same unqualified sense as the counties of a State are to the paramount authority by which they were created. Unquestionably the Constitution and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, are the supreme law of the land, because it is so ordained in the Constitution, but the same instrument also provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people, and it is an obvious rule of construction that these two provisions must be considered together in determining the question under consideration, as they are important provisions in the same instrument, and cannot be regarded as in any respect repugnant to each other.

Counties and other municipal corporations were created by the States; but the States were not created by the United States,

as the States existed as independent sovereignties before even the Union was formed, and they continued to be such from the date of the Declaration of Independence until the Articles of Confederation were ratified ; and even then it was provided in the second article that “ each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by the Confederation expressly delegated to the United States in Congress assembled.” Few in number and restricted in operation as the powers granted to the United States in the Articles of Confederation were, still they were sufficient, with the co-operation of the several States, to carry the country through the war of the Revolution, and to enable the patriots of that day to lay the foundations of our public liberty and national independence. Though the powers granted were sufficient for the time, still when peace came they were soon found to be wholly inadequate to the exigencies of the new government in the relations which it sustained to the several States.

Such powers as the Confederation possessed operated only upon the States as corporations, and not upon the people of the States ; and the system of government as adopted made no provision for an executive of any kind, nor for a judiciary except in certain matters of prize, and for the trial of piracies and felonies committed upon the high seas. Radical defects existed also in the principles of the system, as the Congress could not lay and collect taxes for the support of the government, nor was it vested with any power to compel the States to contribute to the common treasury their just proportions of the amount necessary to defray the expenses incurred for the common defence and general welfare. Difficulties and defects of the kind, too numerous to mention in this investigation, led to the formation and adoption of the present Constitution, which, as recited in the preamble, was ordained and established, “ in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.” Perpetuity was as much the object which the framers of the instrument had in view as any other of the high



purposes therein described, as their declared aim was to secure the blessings of liberty to their posterity as well as to themselves and their constituents. They did not attempt to amend the old system, but they ordained a new one, vesting the powers of government in three separate departments, to wit, the legislative, the executive, and the judicial, and providing that the powers granted should operate not merely upon the States as under the Confederation, but upon the whole people, and investing the new government with most ample powers to enforce the prohibitions of the Constitution, and the laws passed by Congress in pursuance of its provisions.

Evidence to show that the union of the States as perfected in the Constitution was intended to be indissoluble, pervades every part of the instrument, as is sufficiently shown from the extent of the powers granted, and the amplitude of the means provided to carry them into effect. Congress may legislate for all the purposes specified in the express grants conferring such powers, and may pass all laws necessary and proper "for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof."

Provision is also made that the President shall take care that the laws be faithfully executed, and that the judicial power shall extend to all cases in law and equity, arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority. The intended permanency of the new government is portrayed in every one of these provisions, to which it would seem that nothing need be added to show that the doctrine of secession is a wicked heresy; but, if more be needed, it is found in § 4 of the fourth article of the Constitution, which provides that the United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion and . . . domestic violence. None of these views, however, as to the nature and objects of the Federal Constitution or the permanent and indissoluble character of the new government are controverted by either party in this case, and for that reason they

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need not be further considered at the present time. Conceded as they are, they may be assumed as truths which cannot be contested ; but it does not follow that the government ordained by the Constitution is a government of unlimited powers. On the contrary, the settled construction is that the government of the United States is one of limited powers, which is shown to a demonstration by the tenth amendment, which reserves to the States respectively or to the people all power not delegated to the United States by the Constitution, nor prohibited by it to the States. *McCulloch v. Maryland*, 4 Wheat. 421 ; *Hepburn v. Griswold*, 8 Wall. 614 ; 2 Story on Con. 142.

Power to lay and collect taxes was possessed by the States even before the Union was formed, and many years before the Constitution was ordained. Massachusetts adopted her constitution in 1780, and the same with certain alterations and additions is still in full force. Authority was therein given, and in that respect it is unchanged, empowering the legislature "to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and persons resident and estates lying within the said Commonwealth, and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities whatsoever brought into, produced, manufactured, or being within the same." *Provident Institution v. Massachusetts*, 6 Wall. 623.

Since the Constitution was adopted, the States cannot lay any imposts or duties on imports or exports except what may be absolutely necessary for executing their inspection laws, not because Congress may lay and collect taxes, duties, imposts, and excises, but because the Constitution expressly provides that no State shall exercise that power without the consent of Congress. Art. I. § 10. Want of authority in the States to tax the securities of the United States, issued in the exercise of the admitted power of Congress to borrow money on the credit of the United States, is equally certain, although there is no express prohibition in the Constitution to that effect. Outside of those restrictions, however, the power of the States to tax extends to all objects except the instruments and means of the Federal government

within the sovereign power of the State. *Hamilton Co. v. Massachusetts*, 6 Wall. 639. Taxes are defined to be burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes, or, as another text-writer defines the word, a tax is a contribution imposed by the government for the service of the State. Cooley on Con. 479; Blackwell on Tax Titles, 1. Moneys derived from State taxes are as much designed for public purposes or for the service of the State, as moneys raised under the law of Congress, and are just as essential to the support and maintenance of our complicated system of government, as it is an obvious truth that no constitutional government can long continue to exist without that power, or if despoiled of the avails which accrue from its exercise. Officers, legislative, executive, and judicial, are as essential to the existence of the State governments as they are in conducting the affairs of the United States, and it is just as necessary that they should be compensated at the public expense. Comparatively few limitations can safely be annexed to the power of taxation, as the exercise of the power is essential to the very existence of government, and the extent of the demand for its exercise cannot be foreseen, but there is a plain repugnance in conferring upon one government a power to tax the revenues of another in a system of government like that existing in our country, where the constitution of each of the two governments recognizes the other as a part of the system, and where each rests upon the admitted principle that both are to be perpetual.

Influenced by these considerations, our conclusion is that the established rule which prohibits the States from taxing the instruments and means of the Federal government also withdraws the revenues of the State from the taxing power conferred by the Constitution of the United States. Power to tax for State purposes is as much an exclusive power in the States as the power to lay and collect taxes to pay the debts and provide for the common defence and general welfare of the United States is an exclusive power in Congress. Both are subject to certain prohibitions and restrictions, but in all other respects they are supreme powers possessed by each government entirely indepen-

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dent of the other. *Fifield v. Close*, 15 Mich. 505; *Warren v. Paul*, 22 Ind. 279; *Jones v. Keep*, 19 Wis. 369; *Union Bank v. Hill*, 3 Cald. (Tenn.) 325.

Most of the powers conferred upon the government of the United States are exclusive, and it is unquestionably true that the national government in the exercise of those powers is supreme, but it is equally true that powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people, and it follows that the States in the exercise of such powers as are not delegated to the United States and are reserved to them are also supreme. Exclusive powers possessed by the United States cannot be exercised by the States, nor can the exclusive powers possessed by the States be exercised by the Federal government. They are in those respects, though exercising jurisdiction within the same territorial limits, "separate and distinct sovereignties, acting separately and independently of each other within their respective spheres," just as fully "as if the line of division was traced by landmarks and monuments visible to the eye." *Ableman v. Booth*, 21 How. 516; *McCulloch v. Maryland*, 4 Wheat. 429; *Austin v. The Aldermen*, 7 Wall. 699.

Pursuant to the Constitution, Congress may lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States; and the States, subject to the prohibitions of the Constitution, express and implied, may lay and collect taxes and excises for the support of their respective State governments, and each in that behalf is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised. Unless it be so, then the States have only a permissive existence, as it is conceded that the power to tax involves the power to destroy, and that the power to destroy may defeat and render useless the power to create. *McCulloch v. Maryland*, 4 Wheat. 431. Grant that the theory of the defendant is correct, and complete subjugation of all State authority must necessarily follow; as Congress, if they may tax one State office, may tax

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every other office known to the constitution and laws of a State. They may tax the salary of the governor, and the travel and *per diem* of the members of the legislature, as well as the salaries of the judges of the State courts. Revenue may be collected by the States ; but, if the views of the defendant are correct, it may be absorbed by the taxing power of Congress as fast as it is paid into the treasury of the State, and the State may be left as destitute of means to defray its current expenses as if the power to lay and collect taxes and excises did not exist. *Bank Tax Case*, 2 Wall. 200 ; *Van Allen v. The Assessors*, 3 Wall. 573.

Suggestion is made that the theory assumed by the plaintiff, if sustained by the court, will exempt a large amount of property from Federal taxation ; but the decisive answer to that suggestion at the present time, is that the decision of the court is confined to the case presented in the agreed statement. Such a tax, in our opinion, is as indefensible in principle as if levied upon the office held by the plaintiff, or directly upon the revenues of the State before they are paid out of the State treasury, as the tax levied and collected operates to that extent as a reduction of the compensation allowed to the officer, — the effect of which is to require a corresponding addition to his salary. Public officers cannot and ought not to be expected to perform official services without reasonable compensation ; and if not, then it is clear that the effect of such a tax is the same as it would be if levied upon the office instead of the officer, or the salary annexed to the office. According to the agreement of the parties, judgment must be entered for the plaintiff in the sum of \$61.50.



HENRY L. RICHARDSON *et al.*, Libellants and Appellants, v.  
NATHANIEL WINSOR *et al.*

Where the owner retains the possession and navigation of the vessel, and contracts to carry the cargo on freight for the voyage, the charter-party is a mere affreightment sounding in covenant, and the freighter is not invested with the legal responsibility of ownership.

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The charter-party in such case is a contract for the conveyance of merchandise for a stipulated price.

Where the owner parts with the possession, command, and management of the vessel, the charterer becomes the owner for the voyage.

Courts of justice are not inclined to construe the contract as a demise of the ship, even though it may contain words of grant.

If the owners agree to keep the vessel tight, stanch, fitted, and provisioned, and to receive on board such lawful goods as the charterers or their agents might think proper to ship, they retain the command of the vessel, and the charter-party in such case is a mere contract of affreightment.

Then in general the owners are responsible to the charterers for failure to convey the goods according to the terms of the contract.

Where the contract of affreightment amounts to a demise of the ship, the officers and crew are servants of the charterer, the charterer becomes the carrier of the goods shipped, and in procuring freight, the master is then the agent of the charterer.

In this case the owners were the carriers of the goods, and were responsible to the shippers for every loss or damage to the goods during the voyage, unless it happened by the fault of the shipper, the act of God, the public enemy, or without the fault of the carrier, or was excepted in the bill of lading.

In the absence of any special agreement, the duty of the master extends to all that relates to the lading and transportation of the merchandise, and in the case of a mere contract of affreightment, the ship owners and master are responsible for the faithful performance of these duties.

A stipulation in a charter-party that the ship is to employ charterer's stevedore and clerk, does not amount to a special agreement, to the effect that the duty of lading and stowing the goods was to be performed by the charterers.

This clause gave the right to the charterers to name the stevedore and clerk; but they were to be paid, and were subject to the orders of the master.

In this case the clerk and stevedore were nominated by the charterers; but the supervision of the lading was had by an agent of the owners; the receipting for cargo, measurement and stowage, were all under his direction. Pilotage and port charges were paid by the owners, and when loaded the charterers notified the owners they wished the vessel cleared. She was discharged at the port of destination by a stevedore employed by the master. All these facts show that the owners were responsible for the safe custody, due transport, and right delivery.

Whether the general owner retains the possession and command of the ship, or the control and navigation of the same passes to the charterer, the shipper under an ordinary bill of lading, may have his remedy against the ship; but whether the general owner or the charterer is liable, depends upon the terms of the charter-party.

The fact that the charterers have the privilege of appointing the head stevedore does not, as a matter of course, show them to be responsible for the character of the stowage.

**ADMIRALTY appeal.** Charter-party. Libel by the owners of the ship against the charterers to recover charter-money.

Damages were claimed by the libellants, of the respondents, for a breach of the covenants and agreements contained in the charter-party annexed to the libel. They were the owners of the ship called *The Commodore*, and the respondents were the char-

erers of the ship for a voyage from Boston to San Francisco on the conditions expressed in the charter-party. By the terms of the charter-party the whole vessel, including the state-rooms in the cabin, not used by the officers, and the deck-houses, not used for the crew or for the sails and stores, were placed at the sole use of the charterers or their agents, and the charterers covenanted to pay therefor the sum of \$27,500, deducting the commission of two and a half per cent to be paid to the consignees of the ship. All such lawful goods as the charterers or their agents might think proper to ship were to be taken and received on board by the owners, and if required they were to sign bills of lading therefor without prejudice to the charter-party, and without regard to the charter-rate of freight. Forty running lay days were allowed for loading, and the agreement was that the ship should be consigned to the charterers' agent, and that the ship-owners should pay to the consignees of the ship two and one half per cent commission for the collection of the amount of the freight-list. Goods intended for shipment were to be "received and delivered alongside, within reach of the vessel's tackles," and the seventh stipulation was "that the ship is to employ charterers' stevedore and clerk at usual rates." Two breaches of covenant were alleged in the libel as originally framed: 1. That the clerk receipted for a larger quantity of goods than were actually received and laden on the ship. 2. That some of the goods laden on board were spoiled or damaged by reason that the same were badly and improperly stowed by the charterers or their agents.

Founded upon these alleged delinquencies the libellants claimed to recover damages of the respondents as the charterers of the ship, because, as they alleged, they, the libellants, had been compelled in consequence thereof to pay to the shippers of the cargo the sum of \$1300 for short deliveries of goods receipted for, as laden on board, and for goods spoiled or damaged by bad and improper stowage. Leave to file a new count to the libel was subsequently granted to the libellants, and in their new count they alleged that the ship arrived safely at her port of destination, and that all of her cargo was duly delivered in good order except



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Day v. Buffinton.

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dent of the other. *Fifield v. Close*, 15 Mich. 505; *Warren v. Paul*, 22 Ind. 279; *Jones v. Keep*, 19 Wis. 369; *Union Bank v. Hill*, 3 Cald. (Tenn.) 325.

Most of the powers conferred upon the government of the United States are exclusive, and it is unquestionably true that the national government in the exercise of those powers is supreme, but it is equally true that powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people, and it follows that the States in the exercise of such powers as are not delegated to the United States and are reserved to them are also supreme. Exclusive powers possessed by the United States cannot be exercised by the States, nor can the exclusive powers possessed by the States be exercised by the Federal government. They are in those respects, though exercising jurisdiction within the same territorial limits, "separate and distinct sovereignties, acting separately and independently of each other within their respective spheres," just as fully "as if the line of division was traced by landmarks and monuments visible to the eye." *Ableman v. Booth*, 21 How. 516; *McCulloch v. Maryland*, 4 Wheat. 429; *Austin v. The Aldermen*, 7 Wall. 699.

Pursuant to the Constitution, Congress may lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States; and the States, subject to the prohibitions of the Constitution, express and implied, may lay and collect taxes and excises for the support of their respective State governments, and each in that behalf is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised. Unless it be so, then the States have only a permissive existence, as it is conceded that the power to tax involves the power to destroy, and that the power to destroy may defeat and render useless the power to create. *McCulloch v. Maryland*, 4 Wheat. 431. Grant that the theory of the defendant is correct, and complete subjugation of all State authority must necessarily follow; as Congress, if they may tax one State office, may tax

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Richardson *et al.* v. Winsor *et al.*

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every other office known to the constitution and laws of a State. They may tax the salary of the governor, and the travel and *per diem* of the members of the legislature, as well as the salaries of the judges of the State courts. Revenue may be collected by the States; but, if the views of the defendant are correct, it may be absorbed by the taxing power of Congress as fast as it is paid into the treasury of the State, and the State may be left as destitute of means to defray its current expenses as if the power to lay and collect taxes and excises did not exist. *Bank Tax Case*, 2 Wall. 200; *Van Allen v. The Assessors*, 3 Wall. 573.

Suggestion is made that the theory assumed by the plaintiff, if sustained by the court, will exempt a large amount of property from Federal taxation; but the decisive answer to that suggestion at the present time, is that the decision of the court is confined to the case presented in the agreed statement. Such a tax, in our opinion, is as indefensible in principle as if levied upon the office held by the plaintiff, or directly upon the revenues of the State before they are paid out of the State treasury, as the tax levied and collected operates to that extent as a reduction of the compensation allowed to the officer, — the effect of which is to require a corresponding addition to his salary. Public officers cannot and ought not to be expected to perform official services without reasonable compensation; and if not, then it is clear that the effect of such a tax is the same as it would be if levied upon the office instead of the officer, or the salary annexed to the office. According to the agreement of the parties, judgment must be entered for the plaintiff in the sum of \$61.50.

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HENRY L. RICHARDSON *et al.*, Libellants and Appellants, v.  
NATHANIEL WINSOR *et al.*

Where the owner retains the possession and navigation of the vessel, and contracts to carry the cargo on freight for the voyage, the charter-party is a mere affreightment sounding in covenant, and the freighter is not invested with the legal responsibility of ownership.

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age nor for the negligence of the clerk at the port where the goods were shipped. Some of the shippers claimed damages of the charterers at the port of discharge for goods not delivered, and also for injuries to their goods during the voyage. Payments were made by one party or the other, on the arrival of the vessel, to discharge such claims upon the ship, to the amount of \$1300, and the libellants allege that the charterers deducted that amount from the charter-money. Evidence was introduced by the respondents tending strongly to show that the payments were made by the consignees of the ship under the direction of the master; but the district judge assumed in his opinion that the payments were made by the charterers, and inasmuch as the amended libel to which no answer was filed so alleges in substance and effect, and it nowhere appears, either in allegation or proof, that there is not that amount of the charter-money due to the libellants, the court will assume for the purpose of this investigation that the theory of fact on which the cause proceeded in the District Court was correct. *Church v. Shelton*, 2 Curt. 271. Grave doubts, however, are entertained whether the construction of the charter-party adopted by the District Court is the one most consonant with the intention of the parties to the instrument, as collected from the language employed in view of the surrounding circumstances and the subject-matter to which the language was applied.

All agree that the owners did not demise the whole vessel, and they expressly stipulated with the charterers that the vessel should be kept tight, stanch, well fitted and provided with every requisite, and with men and provisions necessary for the voyage; and they agreed to take and receive on board the vessel during the voyage all such lawful goods and merchandise as the charterers or their agents might think proper to ship. Beyond all question, therefore, the owners retained the possession, command, and navigation of the vessel, and it is well settled that the charter-party in such a case is a mere contract of affreightment, and not a demise of the vessel, and that when the charter-party operates merely as a contract between the charterer and ship-owner for the transportation, by the latter, of merchandise to be

shipped on board by the former, the owners of the vessel are the carriers of the goods, and will in general be held responsible to the charterer for the failure to convey the goods according to the terms of the contract of shipment. *The Volunteer*, 1 Sum. 551. Charter-parties may be, and sometimes are, so framed that the vessel herself is let to hire, as the owner parts with the possession, command, and management of the same; and in such cases the charterer becomes the owner during the term of the contract, and the services of the master and crew, unless others are appointed by the charterer, pass to the charterer as accessorial to the principal subject-matter, and in that state of the case they become for the term of the contract, if retained in service, the servants of the charterer, and as such, for the time being, are bound to obey his orders. *The Volunteer*, 1 Sum. 566; *The Aberfoyle*, Abbott Admr. R. 250; *The Spartan*, Ware, 153; 1 Conk. Adm. 178; *Newberry et al. v. Colvin et al.*, 7 Bing. 190; 1 Pars. on Ship. 279.

Commercial usage has sanctioned these two kinds of contracts between ship-owners and charterers, and the rights, duties, obligations, and liabilities of the respective parties are as diverse and different from each other as the covenants of an ordinary lease of a railroad or other means of conveyance are from a contract for the transportation of goods for hire from one place to another. Where the charter-party of affreightment operates as a demise or bailment of the ship to the charterer he becomes the carrier of the goods shipped on board, and in case the vessel is employed by him as a general ship for the conveyance of merchandise, the master in that state of the case, is the servant of the charterer while procuring freight and contracting with third parties, and not the agent of the owners. Nothing of that kind is pretended in this case, and it is clear, therefore, that the owners of the vessel were the carriers of the goods, and as such were responsible to the charterers for every loss or damage during the voyage, however occasioned, unless it happened by the fault of the shipper, or by the act of God, or the public enemy, or by some other cause or accident without any fault or negligence on the part of the carrier, and expressly excepted on the bill of

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lading. *The Niagara*, 21 How. 23. Such instruments sometimes contain special stipulations, and they frequently have ambiguous clauses, and on that account the universal rule is that they shall receive a liberal construction agreeable to the real intention of the parties, and conformable to the usages of trade in general and of the particular trade to which the contract relates. *Raymond v. Tyson*, 17 How. 59; Abbott on Ship. (5th Am. ed.) 350; 3 Kent Com. (11th ed.) 202.

Carriers by water must provide a seaworthy vessel, tight, stanch, and well furnished with suitable tackle, sails, or other motive power, as the case may be, and with furniture necessary for the voyage. She must also be provided with a crew adequate in number, and competent for the voyage, and with a competent and skilful master of sound judgment and discretion, and the owners must see to it that he is qualified for his situation, as they are responsible for his acts and negligence. He must take care to stow and arrange the cargo so that the different goods may not be injured by each other or by the motion of the vessel, or by leakage, unless by agreement this duty is to be performed by persons employed by the shipper. In the absence of any special agreement the duty of the master extends to all that relates to the lading as well as the transportation of the goods, and for the faithful performance of these duties the ship is liable as well as the master and owners. *The Niagara*, 21 How. 23. None of these principles are controverted, but the argument is that the special stipulation in the charter-party, that the ship is to employ charterer's stevedore and clerk at usual rates, amounts to a special agreement that the duty of lading and stowing the goods should be performed by the charterers. Doubtless it was the right of the charterers under that provision, if they saw fit to exercise it, to nominate the clerk and stevedore, but they were to be employed and paid by the owners or master of the ship, and were as much subject to the orders and direction of the master as if the charter-party had contained no such stipulation. *Anglo-African Co. v. Lamzed*, Law Rep. 1 C. P. 229. Merchandise intended as cargo was to be sent alongside of the vessel, within reach of her tackles, and the owners stipulated to take and receive

on board all such lawful goods as the charterers or their agents might think proper to ship. Cargoes are usually received on board by the master or the mate in behalf of the master, and it is his duty, as defined by the rules of the maritime law, to stow and arrange the cargo or different shipments as they are received, so that the different goods may not be injured by each other or by the motion of the vessel or by leakage. Stevedores, being mere employees for a special purpose, are subject to the directions of the officer on board in command of the vessel, and it is impossible, as it seems to the court, to select any clause in this instrument which repeals or overrules those well-settled rules of maritime law. Goods to be shipped were to be furnished by the charterers, and the goods were to be delivered for that purpose alongside within reach of the vessel's tackles. Such were the stipulations of the charterers, but it was the ship-owners who were to take and receive the goods on board of the vessel, and they, as carriers, assumed all the obligations of safe custody, due transport, and right delivery at the port of destination. Pursuant to the authority reserved in the charter-party, the charterers nominated the clerk and stevedore at the port of loading, and they were employed and paid by the owners. During the lading the master for the voyage was not on board, but all the duties of master were performed by a former master of the vessel, and part-owner, who was on board throughout that period, acting as master, and gave directions as such, and as such exercised control. Receipts for the cargo, as it was received, were given by the clerk, and he measured it as it was shipped, and it was stowed by the stevedore, subject to the directions of the person acting as master. Pilotage and port charges were paid by the owners, and when the ship was loaded the charterers notified the owners that they wished her cleared. She arrived safely at her port of destination, and was there discharged by a stevedore employed by the master and paid by the consignees for the owners out of the freight, none having been nominated by the charterers. Whether they had or had not a right to do so, it is not important to determine in this investigation, as they did not exercise that right, even if it was reserved by the charter-party.

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Carriers by water must provide a seaworthy vessel, tight, stanch, and well furnished with suitable tackle, sails, or other motive power, as the case may be, and with furniture necessary for the voyage. She must also be provided with a crew adequate in number, and competent for the voyage, and with a competent and skilful master of sound judgment and discretion, and the owners must see to it that he is qualified for his situation, as they are responsible for his acts and negligence. He must take care to stow and arrange the cargo so that the different goods may not be injured by each other or by the motion of the vessel, or by leakage, unless by agreement this duty is to be performed by persons employed by the shipper. In the absence of any special agreement the duty of the master extends to all that relates to the lading as well as the transportation of the goods, and for the faithful performance of these duties the ship is liable as well as the master and owners. *The Niagara*, 21 How. 23. None of these principles are controverted, but the argument is that the special stipulation in the charter-party, that the ship is to employ charterer's stevedore and clerk at usual rates, amounts to a special agreement that the duty of lading and stowing the goods should be performed by the charterers. Doubtless it was the right of the charterers under that provision, if they saw fit to exercise it, to nominate the clerk and stevedore, but they were to be employed and paid by the owners or master of the ship, and were as much subject to the orders and direction of the master as if the charter-party had contained no such stipulation. *Anglo-African Co. v. Lamzed*, Law Rep. 1 C. P. 229. Merchandise intended as cargo was to be sent alongside of the vessel, within reach of her tackles, and the owners stipulated to take and receive



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Disputes are apt to arise between the charterers and the owners as to what constitutes a full cargo for the vessel in cases where the charter is for a stipulated sum, as it is for the interest of the owner to load lightly, and it is obviously for the interest of the charterers that the vessel should take a full load. Much depends, as to the bulk which the vessel will contain, upon the skill, care, and fidelity of the stevedore, as he cannot at every moment be under the direction of the master, and for that reason, as well as others which might be mentioned, the charterer, in case the general owner retains the possession, command, and navigation of the ship, seeks to control the selection of that employee as the means of enhancing the value of his charter-party. Where the charterer becomes the owner of the vessel for the voyage, such a stipulation is unnecessary, as he possesses that right by the general rules of the maritime law, as he is responsible as carrier for the safe custody, due transport, and right delivery of the cargo. Instruments of the kind may contain a stipulation that the charterer or shipper shall stow the goods, and in the former case the liability as between the ship-owner and the charterer would be upon the former, and in the latter neither would be liable, as the shipper could not claim damages for his own default. Grant all that, still it cannot be admitted that the mere stipulation that the ship shall employ charterer's stevedore without more can have any such effect, as the duty of stowing the goods is still devolved on the master as the agent of the owner, and the stevedore, though nominated by the charterer, is under the control, and subject to the directions of the master or of the owner, if he sees fit to perform that service. Authorities, however, are referred to which, it is insisted, establish a different rule, and it remains to give them a brief examination. *Blaikie v. Stembridge*, 6 C. B. N. S. 899; *Same Case*, 6 Ibid. 911; *Sack v. Ford*, 13 C. B. N. S. 99; *Anglo-African Co. v. Lamzed*, Law Rep. 1 C. P. 229; *Sandeman v. Scurr*, Law Rep. 2 Q. B. 94.

Proper attention to the facts of the first case cited will enable any one to see that it does not control the case before the court, although the charter-party contained the stipulation that the "stevedore for outward cargo to be appointed by charterer, but

to be paid by, and act under captain's orders." Standing alone, and without any reference to the facts of the case, that stipulation would seem to be somewhat analogous to the one under consideration, but the charter-party also contained a stipulation as follows: "Cargoes to be brought to, and taken from alongside at merchant's risk and expense, which the said charterer binds himself to ship," etc. Plaintiffs' agent arranged with the broker of the charterer for the freight and carriage of certain sugar-pans, and sent them alongside without the knowledge of the master and when he was not on board, and before the crew were shipped. Having procured the charter-party, the charterers put up the ship as a general ship, and appointed a stevedore for the outward voyage, and the stevedore and his men went on board for the purpose of stowing the cargo. No contract was made with the master in respect to the goods, and it substantially appears that he did not know that the sugar-pans were to be shipped. They were sent alongside by the shippers, and while the stevedore and his men were hoisting them on board, two of them were by their negligence damaged, and the shippers sued the master for a breach of the contract of affreightment. Judgment in the Common Pleas was rendered for the defendant upon the ground that no contract had been made with the master, and that no wrong had been done by the master and crew. Appeal was taken to the Exchequer Chamber, where the judgment was affirmed upon the same ground, the chief baron remarking that the master is not liable except in the case of a contract with him or some act done by him or the crew for which he is responsible, adding that there was not in that case any contract made by the master, nor any act done by him or the crew which led to the damage.

No extended remarks in regard to the second case referred to are necessary, as the court held that there was nothing in the charter-party to exonerate the owner from responsibility for negligent and improper stowage by the stevedores employed by the charterer under the special stipulation in the charter-party.

Where the stipulation in the charter-party was that "the charterer's stevedore was to be employed by the ship," and the char-

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terer neglected to make any appointment, the Common Pleas held, in the third case cited, that proof of such failure was no answer to an action against the ship-owners for not loading a full cargo, the chief justice remarking that what the defence assumed was a fallacy; that the stipulation did not require the charterers as a condition precedent to appoint a stevedore; that it was introduced for the purpose of giving them an option; that if they chose to exercise the option, it would be the master's duty to employ and pay the stevedore so appointed; that if they did not, the master was still bound to take on board as much cargo as the ship could reasonably carry.

No support to the views of the libellants in this case can be found in the remaining case cited in their favor, as the court say in that case that they attach no weight to the fact that the stevedores by whom the cargo was loaded were appointed by the charterer's agents, and they held that as the charter did not amount to a demise of the ship, and the owners remained in possession of the same, the shipper was entitled to look to the owners as responsible for the safe carriage of the goods, inasmuch as they had delivered the merchandise to be carried in the ship in ignorance that she was chartered, and had dealt with the master as clothed with the ordinary authority of a master appointed by the owners. Whether the general owner retains the possession and command of the ship, or the control and navigation of the same passes to the charterer, the shipper under an ordinary bill of lading may have his remedy against the ship, but whether the general owner or the charterer is liable depends upon the terms of the charter-party. Where it operates as a demise of the ship itself the charterer becomes liable as the owner for the voyage; but if it is simply a contract of affreightment, as in this case, the general owner is liable for every damage chargeable to a carrier, unless by special contract the shipper of the cargo was to load and stow the goods. *Sandeman v. Scurr*, Law Rep. 2 Q. B. 96. Such liability is an incident of ownership, and is chargeable to the general owner unless it appears by express stipulations that the obligation has been assumed by the charterer as special owner for the voyage. *Colvin v. Newberry*, 6 Bligh. 187. Refer-

ence is also made by the libellants to the case of *The Miletus*, 5 Blatch. 335, but as the reporter does not give either the stipulation of the charter-party or the facts and circumstances attending the loading and stowing of the cargo, it is not possible to regard it as controlling the question before the court. Authority to appoint a head stevedore was granted to the charterer in another case not referred to by either party. *The Helene*, Browning & L. 415. Comment upon that case is unnecessary, as the charter-party provided that the cargo should be received and stowed by the master, "the charterers being allowed to appoint a head stevedore at the expense and under the inspection and responsibility of the master for proper stowage." It was suggested, at the argument of the case, that the master could not be liable for bad stowage, as the charterers appointed a head stevedore; but the court held that the stowage was under the inspection and responsibility of the master by the terms of the contract. Stowage in the case before the court was made under the inspection of the acting master and part-owner of the ship, without the knowledge of the charterers or the slightest control or interference on their part, and the court is of the opinion that the owners assumed every responsibility which belongs to a carrier by water for hire.

Suppose, however, that the rule is otherwise, and that the owners of the ship were not responsible for the acts of the clerk and stevedore at the port where the goods were shipped, still the court is of the opinion that the respondents must prevail, as the libellants fail to show that any of the damages sustained by the shippers were occasioned by any act of the clerk or by bad stowage. They do not pretend that the charterers were responsible for the safe custody, due transport, or right delivery of the goods, except so far as the acts of the clerk and stevedore form a part of that obligation. Undoubtedly some of the goods were injured or lost, and the District Court at the hearing on the merits assumed that the injuries or losses, or some part of them, were occasioned by the acts of the clerk and stevedore at the port of loading. His conclusion was, therefore, that the libellants were entitled to a decree, as he held that the charterers were respon-

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Goodyear Dental Vulcanite Company v. Gardiner.

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sible for all such damages, and, consequently, that they were liable to that extent for the unpaid balance of the charter-money. Governed by those views he entered a decree for the libellants, and sent the cause to an assessor to report the amount; but the assessor reported that no part of the damage is proved to have been caused by bad stowage, or by the fault of the clerk at the port of loading. Before the cause was sent to an assessor, the District Court decided that the ship-owners were liable for all the sums paid to the shippers except for the amount, if any, paid for bad stowage and the fault of the clerk. Objections were made by the libellants to the report of the assessor, but the court after hearing the parties accepted the report and dismissed the libel. No exceptions were taken to the report of the assessor, and the evidence exhibited in the record shows beyond a doubt that the conclusion of the assessor was correct. Comment upon the occurrences at the port of discharge is quite unnecessary, as the agreed statement shows that the ship was discharged by a stevedore employed by the master without any reference to the charterers. Regarded, therefore, in either light, the libel is not sustained by the libellants, and the decree of the District Court must be affirmed with costs.

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## RHODE ISLAND DISTRICT.

JUNE TERM, 1871.

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### GOODYEAR DENTAL VULCANITE COMPANY v. BENONI E. GARDNER.

When the complainant in a patent suit has introduced his letters patent in evidence, it affords a *prima facie* presumption that the alleged inventor was the original and first inventor of what is therein described as his invention. This is the case where the respondent is a patentee under letters patent subsequent in date which are also introduced in evidence.

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**Goodyear Dental Vulcanite Company v. Gardiner.**

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The patentee filed his caveat in 1853. During the period intermediate between the filing of his caveat and his application for a patent the inventor was employed in making experiments and in perfecting his invention. The court held, that the evidence did not show that any invention was completed by an alleged prior inventor before the caveat was filed, and that whatever was done by him was done while in the employ of the patentee.

The question of abandonment by the patentee having been fully examined in a former suit under the same patent, further discussion of it in this case was deemed unnecessary.

The claim of the patent was for the "plate of hard rubber or vulcanite, or its equivalent, for holding artificial teeth." The respondent used hard rubber, as he found it combined or prepared by others, as a substitute for gold or other substance in forming the plate and for holding the teeth. *Held*, it was not necessary, in order to show infringement, to prove that the respondent used the hard rubber described in the hard rubber patent referred to in the complainants' specifications.

The respondent used rubber for the plates as a substitute for metallic plates; he employed the same mechanical means in forming the plates, and for setting and adjusting the teeth, and heat to harden the rubber, and fit the product for practical use. *Held*, that infringement of the complainants' patent was shown, although he used a rubber compounded with iodine and not with sulphur (as did the complainants), and under a different patent.

The invention described in the specifications of this patent is not merely a discovery of a chemical process for preparing a described substance for use in forming plates to be used for holding the teeth, and one may be an infringer if he does not use every one of the ingredients of that process.

Neither the correspondence between the commissioner of patents and the applicant nor the proceedings in the patent office, pending an application, are admissible as evidence to enlarge, diminish, or vary the language of the claim of a patent.

Patents for inventions are, if practicable, to be so construed as to uphold and not to destroy the right of the inventors.

THIS was a bill in equity founded upon letters patent of the United States, granted to John A. Cummings, June 7, 1864, reissued March 21, 1865, and assigned to complainants, for new and useful improvements in plates for artificial teeth.

The claim was as follows: "The plate of hard rubber or vulcanite, or its equivalent, for holding artificial teeth, or teeth and gums, substantially as described."

*B. R. Curtis and Browne and Holmes*, for complainants.

*S. D. Law, J. A. Foster, B. F. Thurston, Wingate Hayes*, for respondent.

CLIFFORD, J. Most of the questions involved in the pleadings in this case were presented in the case of the *Dental Vulcanite Company v. Wetherbee*, 2 Cliff. 555, and were at that time carefully examined and decided. Leave, however, to reargue those questions was granted to the respondent at the hearing in this



case ; but the court is still of the opinion that all of the questions presented in the former case were correctly decided on the evidence then exhibited, and refers to the opinion given on that occasion for the reasons upon which that conclusion rests. Some points are made by the present respondent, and some new evidence is introduced on the issue of novelty, which renders it necessary to re-examine the case in those particulars.

He contends that the complainants are not a manufacturing corporation within the meaning of the State statute, because their rubber plates are made to order, and because they are not made by the company. Due consideration was given to that objection on the former occasion, and therefore it will be sufficient to refer to that part of the opinion as reported in the second volume of Clifford's reports. Nothing new is presented in that part of the argument.

Objections of more importance are taken to the validity of the patent, which will be separately considered. They are as follows : —

That the alleged invention is not new and was not patentable.

That the original patentee, John A. Cummings, was not the original and first inventor of the improvement.

Construed as the patent was by the court in the former case, it is hardly denied that the described improvement was patentable; but the argument now is, that the letters patent do not cover the process for making "the plate for holding artificial teeth, or teeth and gums"; that it covers "nothing but the use of hard rubber in making plates for artificial teeth," which, it is insisted, is not patentable, as the qualities of the material were known to all the world, and that the suggestion that it could be applied to such a purpose was not a discovery or invention within the meaning of the patent law. Had the claim of the patent been such as is supposed in the proposition, there would perhaps be some foundation for the argument ; but the proposition is founded on a mistaken view of what is claimed by the patentee in the second reissue.

The claim of the patent is "the plate of hard rubber or vulcanite, or its equivalent, for holding artificial teeth, or teeth and

gums, substantially as described." As designated in the patent, the invention is a new and useful improvement in artificial gums; but it is described in the beginning of the specification as a new and useful improvement in plates for artificial teeth, which, perhaps, is the better general description.

Taken literally, the claim is for the product as manufactured; but when the introductory words are considered in connection with the words "substantially as described," it is clear that it includes not only the plate of hard rubber for holding artificial teeth, or teeth and gums, but the process or mode by which they are constructed. Unsupported, as the theory of the respondent is, by any phrase or word contained in the claim or specification, it does not seem to require any argument to refute it except to say that the meaning of letters patent, like other grants or written instruments, must be ascertained by the language employed, as applied to the subject matter.

Much aid may be derived in construing the claim of a patent by referring to the descriptive part of the specification, and reference may also be made, if need be, to the drawings and patent-office model; but neither the correspondence between the commissioner and the applicant nor the proceedings in the patent-office are admissible to enlarge, diminish, or vary the language of the claim.

Evidence to prove the state of the art is admissible, and expert testimony to aid in expounding and defining technical words and phrases may be received, but in all other respects the rules for the construction of letters patent are the same as those applied in construing other grants and written instruments. Patents for inventions are to receive a liberal interpretation, and are, if practicable, to be so construed as to uphold and not to destroy the right of the inventors. *Turrill v. Michigan S. & N. R. R. Co.*, 1 Wall. 491; *Ames v. Howard*, 1 Sum. 482.

Reference in this case must be made to the descriptive part of the specification as well as to the claim, and when that is done it becomes apparent that the views of the respondent cannot be sustained.

Special reference is made by the inventor, in the first place,

to the objections and inconveniences observable in the old mode of attaching artificial teeth to a metallic plate, and fitting the same to the roof of the mouth. They were, as stated in the specification, that the metal was expensive, and that the plate being hard and unyielding was apt to injure the mouth, and that its tendency was to impede mastication and obstruct articulation. He then describes the hard rubber which he uses for that purpose, characterizing it as an elastic material, possessing and retaining, when used for that purpose, sufficient rigidity for the purpose of mastication, and yet being pliable enough to yield a little to the motion of the mouth.

His invention, as he states, consists in forming the plate, to which the teeth or teeth and gums are attached, of hard rubber or vulcanite; but he proceeds at once to give a description of the manner of making the hard rubber plates, from which it appears that impressions are taken of the mouth or that part of it which the plate is to fit, of wax or plaster, in the same manner as is usually practised in the construction of gold plates for artificial teeth. Superadded to that is also a description of the means employed in setting and securing the teeth, as also of the kinds of teeth which may be employed. They are provided with pins projecting in such a manner that the rubber will close around them and hold them securely in position. Minute description is also given of the manner in which they are set in place and adjusted to the proper distance and fulness; and when completed, the statement is that the plaster mould, with the teeth set as described, is carefully filled with soft rubber, and the same is made secure in its position by placing another plaster mould over it, and while in that condition it is heated and baked in an oven, or in some other suitable way.

Other analogous considerations might be deduced from the description of the invention as given in the specification, to negative the theory of the respondent as to the construction of the patent, but it does not seem to be necessary to pursue the subject, as those already referred to are amply sufficient to show that the views of the respondent find no substantial support from the language employed in any part of the specification.

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next objection taken by the respondent to a decree, and he has introduced that issue in the pleadings, but of a character to require any extended answer in his answer that letters patent were granted to the patentee, as alleged in the bill of complaint. The court adheres to the opinion that the letters patent introduced in evidence by the complainants create a *facie* presumption that the patentee was the original inventor of what is therein described as his invention. See *Woolen Co. v. Jordan*, 7 Wall. 596; *Blanchard v. Wood*, 8 Wall. 428.

It is made to show that that rule does not apply in this case. Letters patent have also been granted to the respondent. It is clear that the introduction of the respondent's answer does not change the burden of proof on the question of infringement. The respondent must still prove the allegation of his answer that the patentee was not the original and first inventor of the invention.

It was formerly entertained whether the letters patent of the respondent were admissible in any view of the case, but the settled rule that the question of infringement is not controlled or materially affected by such consideration. See *Putnam v. Corning*, 8 Wall. 425; *Corning et al v. Burden*,

In the case last named, the letters patent of the respondent are admitted in evidence on the question of novelty. It is of some weight, where the evidence is nicely balanced, but it is quite incorrect to suppose that a patent subsequently granted can have the effect as evidence to overcome the presumption otherwise afforded by the introduction of the letters patent of the patentee, that the patentee was the original and first inventor of what is therein described as his improvement. Such a rule is without any foundation in principle, and finds no support in the analogy of the law or in any decided case.

Upon the evidence in the former case are unnecessary. The court is satisfied that the decree in that case was

case ; but the court is still of the opinion that all of the questions presented in the former case were correctly decided on the evidence then exhibited, and refers to the opinion given on that occasion for the reasons upon which that conclusion rests. Some points are made by the present respondent, and some new evidence is introduced on the issue of novelty, which renders it necessary to re-examine the case in those particulars.

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Evidence to prove the state of the art is admissible, and expert testimony to aid in expounding and defining technical words and phrases may be received, but in all other respects the rules for the construction of letters patent are the same as those applied in construing other grants and written instruments. Patents for inventions are to receive a liberal interpretation, and are, if practicable, to be so construed as to uphold and not to destroy the right of the inventors. *Turrill v. Michigan S. & N. R. R. Co.*, 1 Wall. 491 ; *Ames v. Howard*, 1 Sum. 482.

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Special reference is made by the inventor, in the first place,

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for setting and adjusting the teeth and for securing them in position as the complainants do, and he also employs heat to harden the rubber and fit the product for practical use as a substitute for natural teeth.

Two theories appear to be set up by the respondent, and they are not entirely consistent: —

1. That the invention used by the complainants is merely a discovery that hard rubber, as manufactured under the hard rubber patent, may be applied as a substitute for metallic substances in forming plates for artificial teeth and for securing the teeth in position.

2. That the invention is merely a discovery of a chemical process for preparing a described substance for use in forming plates to be used for the before-mentioned purpose, and that no one can be regarded as an infringer unless he uses every one of the ingredients of that process.

But neither of the theories is correct. Sufficient has already been remarked to refute the first suggestion, and it is quite obvious that the second is equally fallacious and unsupported by anything to be found in the specification.

Decree for the complainants.

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DEWIT C. PENDLETON v. RUFUS B. KINSLEY.

While collecting the fares, the clerk of a steamer owned by the defendant, inflicted personal injuries upon the plaintiff, on board the vessel during one of her regular trips. *Held*, the plaintiff could recover of the defendant for the injuries received, although the defendant did not authorize the acts of his employee.

The principles of law applicable to the relations of master and servant, do not fully define the rights, duties, and obligations between carriers of passengers, and passengers; they are not merely citizens bearing only toward each other the relations which one citizen bears to another: the carrier had agreed to carry for hire the passenger from one place to another, and was responsible for any breach of the obligation he had assumed, that the passenger should not be ill used by himself or his employees.

A dispute had arisen between the clerk and the passenger as to the latter's fare, but the question whether the defendant was liable for the injuries inflicted by his clerk upon the plaintiff was decided irrespective of that dispute, and as if none such had arisen.



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Passengers do not only contract for room and transportation, but for good treatment, and it is the duty of the owners to use due care and exertion to protect them from any degree of violence, or kind of abuse or ill-treatment from other passengers, or the owners' servants or other persons coming on board during the trip.

The principal in this class of cases is liable for the misconduct of the employee, when it occasions injury to the passenger, whether arising from malice or neglect.

CASE against the defendant to recover damages for injuries resulting to the plaintiff from an assault and battery alleged to have been inflicted upon him by one Charles L. Stanhope. Personal injuries were inflicted on the plaintiff by Charles L. Stanhope, clerk of the steamboat Perry, employed at the time and for many years before in carrying passengers and freight between Newport and Providence, in this district, and he brought action against the defendant, as the owner of the steamer, to recover compensation for the injuries so inflicted while he was a passenger on board the steamer. Service having been made upon the defendant, he appeared and pleaded the general issue, and upon that issue the parties went to trial, and the jury, under the instructions of the court, returned a verdict for the defendant, subject to the opinion of the court upon questions of law reserved by the court for further consideration. Evidence was introduced by the plaintiff sufficient to warrant the jury in finding that the defendant was owner of the steamer for the voyage, as it appeared that the record title of the steamer was in his name, that the clerk was in the employment of the defendant, and that the steamer was not under charter to any other person.

Business made it necessary for the plaintiff to go to Providence on the 29th of August, 1862, and, being at Newport at the time, he went on board of the steamer for that purpose before she started from Newport on her morning trip to the former place. He had often passed over that route in that steamer before, and, having been accustomed to purchase tickets for the trip, of the clerk of the steamer, he applied to him for one on this occasion, within a short time after he went on board, and offered him a one-dollar bill on one of the national banks of the State to pay for the ticket. The price of tickets was fifty cents, and the witness states that he had frequently offered bills for tickets before that time, and seen others do the same thing, and that the clerk

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always received the bills and made change without any objections. On this occasion, however, he refused to take the bill, or give him a ticket, saying that he had no change, to which the plaintiff replied, "If you have no change, give me postage-stamps," but the clerk replied to that suggestion that he had no postage-stamps, and suggested that the plaintiff would have to take two tickets, to which the plaintiff replied that he did not want two tickets, adding that he was not accustomed to purchase tickets in advance. Whereupon the plaintiff left the main deck, where the office of the clerk was, and went to the saloon deck above, where there were many gentlemen and ladies and children sitting on the settees facing the stern of the steamer. Nothing further of importance occurred till after the steamer passed Portsmouth grove, when the express-agent came round to collect the tickets from the passengers, as he sometimes did, in the place of the clerk who had charge of that business. He went to the plaintiff and asked for his ticket, but the plaintiff told him that he had none; that he offered to pay for one when he first came on board, and that the offer which he made was refused, to which the express-agent replied, "You will have it to pay," and passed along. In a few minutes the clerk and the express-agent came up together, and the clerk demanded pay for his fare of the plaintiff, but the plaintiff replied substantially as before, that he had once offered to pay for a ticket, and that he, the clerk, had refused to accept the pay for the same. Here the conversation ended, but the clerk seized the plaintiff by the collar and pulled him violently from the settee where he was sitting, pushed him from there to the companion-way, and shoved him down those steps to the main deck, near where he was when he offered to purchase and pay for a ticket, and from there he pushed him to the companion-way leading to the lower deck, and shoved him down that passageway also to the lower cabin, and set him down violently on the seat near the berths, and left him without any explanation. Left alone he remained there for a short time, and then went to the saloon deck, where he was when he was assaulted, and on the arrival of the steamer at Providence he left her unmolested, and on the following day returned to his own residence.

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Evidence was introduced by the plaintiff tending to show that he was seriously injured in his back and other parts of his body, and that the injuries were of a permanent character. Much testimony was introduced as to the extent of his injuries, but it is unnecessary to refer to it in this report, as the defendant at the close of the plaintiff's case moved the court to instruct the jury that in view of the whole evidence the plaintiff could not recover, and that their verdict should be for the defendant; and the court gave that instruction as requested. After the verdict a motion for new trial was duly filed by the plaintiff, and the parties were heard upon the question whether the defendant in any view of the evidence was liable for the assault committed on the plaintiff by the clerk of the steamer.

*J. M. Blake and F. W. Miner*, for plaintiff.

*W. P. Sheffield*, for defendant.

CLIFFORD, J. Owners of vessels engaged in carrying passengers assume obligations somewhat different from those whose vessels are employed as common carriers of merchandise. Obligations of the kind in the former case are in some respects less extensive and more qualified than in the latter, as the owners of the vessel carrying passengers are not insurers of the lives of their passengers, nor even of their safety, but in most other respects the obligations assumed are equally comprehensive and stringent. Carriers of passengers by land, it was said in one of the early cases, are not liable for injuries happening to passengers from unforeseen accident or misfortune, where there has been no negligence or default; but it was held in the same case that the smallest negligence would render the carrier liable, and that the question of negligence was for the jury. *Aston v. Heaven et al.*, 2 Esp. R. 538. Where the injury for which the action was brought resulted from the breaking of the axle of the coach, the court held, in the case of *Christie v. Griggs*, 2 Camp. 79, that "when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied," subject, of course, to opposing testimony; that the question of negligence was for the jury; that if it appeared that the axle-tree was sound, "as far as the human eye could discover," the defendant was not liable;

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that there was a difference between a contract to carry goods and a contract to carry passengers; that the carrier of goods was liable at all events; that the carrier of passengers did not warrant their safety; that his undertaking went no further than that he would provide for their safe conveyance as far as human care and foresight could go; that the owner was liable if there was the least negligence; but that the plaintiff had no remedy for the misfortune if the breaking down of the coach was purely accidental. Attempts have been made to show that the rule laid down in the case of *Sharp v. Grey*, 9 Bing. 457, is more stringent against the owner, but the question submitted to the jury in that case was whether the degree of vigilance practised by the defendant was such as was required by his engagement, and two at least of the judges concurred in refusing the motion for the new trial upon the ground that the question was one of fact for the jury. The remarks of the chief justice in the case of *Crofts v. Waterhouse*, 3 Bing. 319, are sometimes referred to as advancing a more stringent rule, but the opinion taken as a whole furnishes no support to the suggestion, and his associate on the occasion stated in terms that a carrier of passengers is only liable for negligence. Proprietors of stage-coaches, it is held in the case of *Ingalls v. Bills et al.*, 9 Met. 1, are not answerable for an injury to a passenger which happens by reason of a hidden defect in an iron axle-tree, which defect, being entirely surrounded by sound iron one fourth of an inch thick, could not be discovered by the most careful external examination. Carriers of passengers, by railways or steamers, are bound to greater precautions, and to a higher degree of care, skill, and vigilance in the preparation and management of the vehicles or means of conveyance than are required of the owners of stage-coaches, because the car of the railway proprietor and the steamer of the carrier by water are intended to sustain far greater weight, and are to be propelled by much greater power and at much greater speed. *Simmons v. Steamboat Co.*, 97 Mass. 367.

Passengers must take the risk incident to the mode of travel which they select, but those risks, in the legal sense, are only such as the utmost care, skill, and caution of the carrier in the

preparation and management of the means of conveyance are unable to avert. *Hegeman v. Western R. R. Co.*, 18 N. Y. 24. Damages were claimed by the plaintiff in that case for injuries received by the breaking of the axle of a railway car in which he was riding, and the defence was that the car was a new one, recently purchased of a manufacturer of skill and good repute, and that it was carefully examined at the time of the purchase; that the track was in good condition; that the speed of the train was not excessive; and that the employees were sufficient in number and of sufficient experience and skill, and that they were guilty of no negligence: but the court instructed the jury that it made no difference whether the car was constructed by the company or purchased of an experienced manufacturer, as the defendants were liable in either event if the defect could have been discovered in the process of manufacturing the axle or car by the application of any test known to men skilled in that business, and the Court of Appeals affirmed the judgment. They held that the carrier of passengers was bound to the utmost precaution, care, and skill in the preparation and management of the means of conveyance; but they conceded that the carriers of passengers were not insurers, and that latent defects might exist in machinery, undiscoverable by the most improved and vigilant examination, and from which the most serious accidents may occur.

Expressions are found in the opinion of the court in the case of *Boyce v. Anderson*, 2 Pet. 150, which leave it to be inferred that the court was of the opinion that the carriers of passengers were only required to exercise ordinary skill and care to secure their safety; but the correct rule is stated in the case of *Stokes v. Saltonstall*, 13 Pet. 199, where the same court held that proof of the accident and alleged injury afforded a *prima facie* presumption that there was carelessness, negligence, or want of skill on the part of the driver; that, it being admitted that the carriage was upset, and that the plaintiff was injured, it was incumbent on the defendant to prove that the driver was a person of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which he was engaged, and that he acted on the occasion with reasonable skill, and with the utmost

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prudence and caution, and if the disaster in question was occasioned by the least negligence or want of skill or prudence on his part, then the defendant, as the owner of the coach, was liable in that action. *Hall v. Conn. River Steamboat Co.*, 13 Conn. 326; *Briggs v. Taylor*, 28 Vt. 180; Redf. on Railw. 175; *Railw. v. Yarwood*, 17 Ill. 509. Negligence in the smallest degree renders the carrier liable, and there is one case in which it was held that a railroad corporation was liable for injuries to a passenger caused by a defect in an iron axle of a car, although it was of such a character that it could not have been discovered by any practicable mode of examination; but the rule there laid down is expressly disapproved in a recent judgment of the Exchequer Chamber, and cannot be adopted in this circuit until it is approved by the Supreme Court. *Alden v. N. Y. Central Railroad Co.*, 26 N. Y. 102; *Readhead v. Midland Railway Co.*, Law Rep. 2 Q. B. 412; Same Case, Law Rep. 4 Q. B. 379; *Simmonds v. Steamboat Co.*, 97 Mass. 368. Such carriers are not insurers against accidents, nor are they required to do what is impossible in the nature of things. 1 Smith. Lea. Cas. (5th ed.) 328. Undoubtedly they are bound to the highest degree of care, prudence, and caution; but if the injury results from a hidden defect in the car, engine, or other apparatus, unknown at the time, and which could not be detected by any known means, they are not responsible, because the obligation which they assumed did not require what it was not in their power to perform. *McElroy v. N. & L. Railroad Co.*, 4 Cush. 400; Story on Bailm. 581. Whether the owners of a vessel engaged in carrying passengers by water are or are not insurers, as to the seaworthiness of the vessel, it is not necessary to inquire, as no complaint is made in this case that the steamer was not in a seaworthy condition. 3 Kent Com. (11th ed.) 205; *Lyon v. Mells*, 5 East, 428; *Putnam v. Wood*, 3 Mass. 481; *Silva v. Low*, 1 Johns. Cas. 184; *The William Henry*, 4 La. 223. Passengers, however, contract with the proprietors or owners of the conveyance, and not with their agents as principals, and the question of the liability of the proprietor or owner is wholly unaffected by the fact that the defective car, engine, or other apparatus was purchased of another if

the defect was one which might have been discovered by any known means. Whether their engine or car was manufactured at their shop or was purchased of other manufacturers, the company is equally liable to see that in the construction no care or skill was omitted for the purpose of making the car or engine as safe as the utmost care and reasonable skill could make it. Precautions of the kind are required of the carrier to provide for the safety of passengers; but the obligation which the carrier assumes in that behalf extends beyond the specified requirements in respect to the vehicle, car, or other means of conveyance, and also includes an implied stipulation for good treatment of the passenger during the passage, trip, or voyage, and especially against ill-treatment by the carrier or his employees, and against every degree of violence on their part, or wanton interference with his person. Mistakes occur in such litigations by overlooking the fact that it is the carrier, whether corporation or natural person, that assumes these obligations, and not the driver, master, or conductor of the conveyance, for the breach of which a right of action accrues to the passenger. Breaches of the obligation assumed by the carrier for proper treatment of his passengers, it is conceded, would give a right of action to the passenger if the acts constituting the breach were committed by the carrier himself; but the argument is, that the carrier is not responsible for any wilful trespass committed by the driver, conductor, or master, unless it be shown either that he authorized the act or ratified it after it was committed.

Many decided cases may be found where it is held that the master is not liable for the wilful act of his servant unless previously authorized or subsequently ratified; but none of these cases can have any proper application to the controversy before the court. *M'Manus v. Crickett*, 1 East, 106; *Croft v. Alison*, 4 Barn. & Ald. 590; *Wright v. Wilcox*, 19 Wend. 343. Examined carefully, it will be found that all or nearly all of those decisions may be divided into two classes, neither of which will afford much aid in the solution of the question involved in the present motion: 1. Cases where it is held that trespass will not lie against the master for the wrongful act of his servant; 2. Controversies where it appears



that the acts of the servant constituting the cause of action were not done by the servant in the course of his employment.

Doubts are expressed by an able text-writer whether the court in the leading case ever intended to decide more than that the master is not liable in trespass for the wilful act of the servant, and it must be admitted that the reasons assigned for the conclusion are well put, and that they are entitled to great consideration. 1 Redf. on Railw. (3d ed.), 512. Suppose that view, however, is not correct, then it is clear that the rule laid down in that case is not applicable in actions against corporations, as it is well settled that they are responsible for acts done by their agents, "either *in contractu* or *in delicto*," if done "in the course of its business and of their employment." *P. W. & B. Railroad Co. v. Quigley*, 21 How. 210; *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465; *Maund v. Monm. Canal Co.*, 4 Man. & Grang., 452; *Phil. & Read. R. R. Co. v. Derby*, 14 How. 483; *National Ex. Co. v. Drew*, 2 McQueen H. of L. Cas., 103; *Goff v. Railw. Co.*, 3 Ellis & Ellis, 674.

Extended remarks respecting the second class of cases is unnecessary, as it fully appears that the clerk in collecting the tickets was engaged in the business of the defendant, and was in the course of his employment. Masters are bound by the acts of their servants whenever there is an express command of the master to make a contract or do an injury, or where a servant does an injury in the immediate pursuit of his master's business, or where an injury arises to another through the negligence or want of skill of the servant. Reeve Dom. Rel. (3d ed.), 356. Questions of the kind also involve to some extent the relations, obligations, and liabilities of principal and agent, as in many cases the act of the agent is the act of the principal, and it is well settled that the representations, declarations, and admissions of the agent in the course of his agency are deemed a part of the *res gestæ*, and are equally obligatory upon the principal as if made by himself. Principals are not in general responsible for the criminal acts or misdeeds of their agents, but they are held liable to third persons, in a civil suit, for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other mal-

assurances or misfeasances and omissions of duty of their agents in the course of their employment, though they did not authorize the acts, nor participate in the transaction, and even if they forbade or disapproved what was done. Such, in substance, are the views of Judge Story, as expressed in his work on Agency, and the Supreme Court have decided that the rule of "*respondeat superior*" or "that the master shall be civilly responsible for the tortious acts of his servant," is of universal application, whether the act be one of omission or commission, whether negligent or deceitful; that if it be done in the course of the employment of the servant the master is liable; and that it makes no difference that the master did not authorize or know of the act or neglect, or even if he disapproved or forbade it, he is equally liable if the act be done by the servant in the course of his employment. Story on Agency, § 452; *P. & R. Railw. Co. v. Derby*, 14 How. 486; Smith on M. & S. 152; *Sleath v. Wilson*, 9 C. & P. 607; *The New World v. King*, 16 How. 474.

Tested by these considerations, it is quite clear that the instruction given by the court to the jury was erroneous, and that the verdict should be set aside and a new trial granted. But the court is of the opinion that the principles of law applicable in litigations growing out of the relations of principal and agent or master and servant are not the principles which fully define the rights, duties, obligations, and liabilities of the parties to this controversy. They are not strangers bearing no other relations to each other than one citizen, merely as such, bears to another; but the defendant was a carrier of passengers by water, and the plaintiff was a passenger on board the steamer of the defendant, which was engaged in carrying passengers for hire between two commercial ports. Difficulty occurred as to making change in the sale and purchase of a ticket for the trip, but the court lays that circumstance out of the case, as it is clear that the omission to purchase a ticket gave the clerk of the steamer no right whatever to inflict any personal violence on the plaintiff. Fare not having been paid by the plaintiff, the carrier, if he thought proper, might have requested him to leave the steamer, and if the request had been seasonably made and the plaintiff had

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refused to pay or leave, the carrier might at a proper time and place have stopped the steamer, and might have removed the plaintiff from the steamer to the shore, taking care to use no more force than was reasonably necessary for that purpose.

Nothing of the kind, however, was done or attempted, and the question as to the rights, duties, obligations, and liabilities of the parties to the suit must be determined solely in view of the facts as stated in the commencement of the opinion. Viewed in that light, as the case must be, then it appears that the clerk of the steamer demanded fare of the plaintiff, and that the plaintiff having refused to pay as requested, the clerk seized him by the collar and inflicted personal violence upon him in the manner and by the means set forth in the statement. Unjustifiable as the conduct of the clerk was, the case must be viewed as between these parties, just as it would be if no dispute had arisen as to the fare, and the questions to be decided are whether the defendant is liable for the injuries inflicted upon the plaintiff by the clerk, and, if so, upon what ground does that liability rest. Sufficient has already been remarked to show that the owner of the steamer is liable to the plaintiff for the injuries inflicted upon him by the agent of the owner, but it is quite important in case of a new trial to ascertain upon what ground that liability arises, whether merely as a principal answering for the acts of his agent in the course of his employment, or as a carrier of passengers answering as such, for a breach of the obligation which he assumed as such carrier, that the plaintiff as his passenger should not be ill treated by himself or his employees, and that he and they should use all due care and proper exertion to protect him as such passenger from any degree of violence or any kind of abuse or ill-treatment from other passengers, or other persons coming on board during the trip. *Flint v. N. & N. Transportation Co.*, 34 Conn. 554. Ship-owners, as well as the proprietors of conveyances by land, select and appoint their own agents without consulting their passengers, and it is but reasonable that they should be held responsible for any act of violence to the passenger of which such employees may be guilty, as the moment the passenger enters the steamer or other conveyance he is more or

less under the control of the master or conductor, and subject to their orders. Fit or unfit, humane or brutal, good-tempered or morose, the passenger is comparatively helpless, and may be obliged to submit for the time without any means of redress. He may have his remedy against the carrier, it is said, if he can prove that the carrier was negligent, or that the active person was the agent of the carrier and was in the course of his employment, but, if not, he must be content with his remedy against the assailant of his person. Adjudged cases may be referred to which support that proposition without qualification, but they do not give full scope and effect to the obligation which the carrier assumes towards his passenger, nor to the rights and duties which those relations create and imply.

Passengers do not contract merely for ship-room and transportation from one place to another, but they also contract for good treatment and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance, and for the fulfilment of those obligations the carrier is responsible as principal, and the injured party in case the obligation of good treatment is broken, whether by the principal or his employees, may proceed against the carrier as the party bound to make compensation for the breach of the obligation. *Chamberlain et al. v. Chandler*, 3 Mas. 246; *Nieto v. Clark*, 1 Cliff. 145; *Weed et al. v. Panama Railroad Co.*, 17 N. Y. 362; *Keene v. Lizardi et al.*, 5 La. 431; *Block v. Bannerman et al.*, 10 La. An. 3. Sickness and suffering were experienced by the wife of the plaintiff in the case of *Weed et al. v. Panama Railroad Co.*, in consequence of the failure of the train to arrive at the usual time, and the evidence showed that the detention was the wilful act of the conductor. Proof of that fact having been given, the defendants contended that they were not liable; but the court refused so to instruct the jury, and the Court of Appeals held that the prayer for instruction was properly refused, as the proof offered that the act of the conductor was wilful constituted no defence to the action. High authority exists, if any be needed, in support of the proposition that the owners of a vessel are responsible for the whole conduct

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 Pendleton v. Kinsley.
 

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of the master while he is on board and in command of the vessel unless his acts amount to a criminal offence. *The Nimrod* Notes of Cas. 559. Civilly speaking, says Dr. Lushington, that case the owners are responsible for any deviation of the master from that line of conduct which it behooves him to perform, not simply in the navigation of the vessel and in the care of his own seamen, but in the care of those who may be thrown on board his ship, even by an accident, as was the fact in the present case. Most of the recent cases in which the principle involved in such a controversy is considered, proceed upon the ground that where the misconduct of an agent causes a breach of the obligation, or contract of the principal, then the principal is liable in action to the injured party, whether such misconduct be wilful or malicious or merely negligent; and it would seem that it must be so, as the cause of action arises from the breach of the obligation, and if so it cannot make any difference whether the breach was occasioned by the act of the principal or of his employee. *Qui facit per alium facit per se*. *M. & M. Railway Co. v. Hiney*, 10 Wis. 330; *Goddard v. Railroad*, 57 Me. 202; *Railway v. Hinds*, 53 Penn. St. 515.

Conductors and employees of a railroad company represent the company in the discharge of their functions, and, being in the line of their duty in collecting the fare or taking up tickets, the corporation is liable for any abuse of their authority, whether of omission or commission; and the same rule must be applied in a suit against the owner of a steamer as the carrier of passengers for the misconduct of the master, as the owners of a vessel carrying passengers for hire are liable for breaches of the duty of the master to the passengers equally as they are in the case of merchandise committed to their care. 3 Kent Com. (1866) 160; *B. & O. Railw. Co. v. Blocher*, 27 Md. R. 28; *Kane v. Lizardi*, 5 La. 431; *Sanford v. Railroad Co.*, 23 N. H. 344. Owners are liable for the conduct of the master as master during the voyage, and for any ill-treatment of the passengers by the master in his capacity as such, a remedy may be had against the vessel herself. Abbott Adm. R. 257. Vessels carrying passengers for hire, says Mr Justice Nelson, stand on the

same footing of responsibility as those carrying merchandise, the passage-money in the former case being the equivalent for the freight in the latter; that the vessel as well as the owner is responsible for a breach of a contract with the passenger: Same Case, 1 Blatch. 361; Parsons on Ship. 30; *The Revenge*, 3 Wash. 267; *Ralston v. Steamer State Rights*, Crabbe, 46. Repeated decisions of the Supreme Court of Massachusetts are to the same effect, as will sufficiently appear by the following citations: *Moore v. Fitchburg R. R.*, 4 Gray, 465; *Hewett v. Swift et al.*, 3 Allen, 423. Wherever there is a contract between the master and another, the master, says Hoar, J., is responsible for the acts of his servant in executing the contract, although the act is fraudulent and one without his consent. *Howe v. Newmarch*, 12 Allen, 55; *Seymour v. Greenwood*, 7 Hurl. & Nor. 357; *Aycrigg's Ex'rs v. N. Y. & E. Railroad Co.*, 1 Vroom (N. J.), 462; *Penn. R. R. Co. v. Vandiver*, 42 Penn. St. 370. Examined in any point of view, the court is of the opinion that the instruction given to the jury was erroneous, and the verdict is set aside and a new trial granted.

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BENJAMIN B. KNIGHT AND ALBERT S. GALLUP, ASSIGNEES OF  
AMASA MANTON *v.* THE OLD NATIONAL BANK.

The directors of a national bank, organized under the act of June 8d, 1864, adopted the following by-law: "No person indebted to the bank shall be allowed to sell or transfer his or her stock without the consent of a majority of the directors, and this whether liable as principal or surety, and whether the debt or liability is due or not." A stockholder indebted to the bank assigned by deed in trust for the benefit of his creditors his stock without the consent of the directors, and the assignees requested the bank to record the deed of assignment upon the transfer-book of the bank, or that they might "be allowed to transfer the stock to themselves on the books of the bank." The requests were refused by the bank. *Held*, that the by-law was valid, and that the directors, under § 8 of the act referred to, had power to adopt the same.

MANTON became the proprietor and holder of eighty shares of the capital stock of the Old National Bank in the place of eighty shares of stock previously held by him in the State Bank of that

name, and continued to be such proprietor and holder from the organization of the bank as an association for banking, under the acts of Congress, until he transferred the same to the plaintiffs as his assignees. Such transfer was made on the 18th of February, 1867, by deed in trust for the benefit of creditors, and on the same day the plaintiffs presented the deed of assignment to the defendant bank, and requested that the same might be recorded upon the transfer-book of the bank, or that they might be permitted to transfer the stock to themselves upon the books of the bank, in the form prescribed by the directors, but the corporation defendants refused both requests, and also refused to allow the plaintiffs to make any transfer of the stock, to secure their rights under the deed of assignment. Damages were claimed by the plaintiffs, of the defendant bank, in an action of trespass on the case for the injuries to the plaintiffs, occasioned by the refusal to allow such transfer of the stock in question to be recorded, or made on the books of the bank.

The defendants justified their refusal to allow the stock to be entered upon their books as transferred, upon the ground that the proprietor and assignor of the stock was indebted to the bank, that the bank, at the time of the assignment, and of the demand, held two bills of exchange, drawn by Dorr and Morgan, and accepted by the firm, of which the holder and assignor of the stock was a copartner in trade. Those bills of exchange were as follows: One was dated Nov. 26th, 1866, for \$5,000, and the other was dated Feb. 4th, 1867, for the sum of \$7,000, and both were made payable to the order of the drawees four months from date, and were by them endorsed to the defendant bank, and were there discounted on the day of their date for the benefit of the drawers.

Provision was made in the articles of association that the board of directors should consist of eight stockholders, and that a majority of the directors should constitute a quorum to do business, and that the directors should have power to make all by-laws that might be proper and convenient for them to make under said act for the general regulation of the business of the association, and the entire management and administration of its affairs,



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which by-laws might prohibit, if the directors should so determine, the transfer of stock owned by any stockholder who might be liable to the association either as principal or debtor, or otherwise, without the consent of the board.

On the 10th of January, 1867, the board of directors, seven being present, adopted the following by-law: "That no person indebted to the bank shall be allowed to sell or transfer his or her stock without the consent of a majority of the directors, and this whether liable as principal or surety, and whether the debt or liability is due or not." Authority to adopt by-laws, if the directors so determine, which shall prohibit the transfer of stock owned by any stockholder who may be liable to the association, either as principal debtor or otherwise, without the consent of the directors, was expressly conferred in the articles of association which are signed by all the persons who united to form the body corporate, as recognized in § 8 of the act. Pursuant to that authority the by-law in question was adopted by the directors, and the same was in full force at the time the demand was made, that the deed of transfer should be recorded, and the court said "it is clear to a demonstration that the language of the by-law is sufficiently comprehensive to justify the refusal, and that the plaintiffs have no cause of action if the by-law is valid."

*B. T. Eames and Samuel Curry*, for the plaintiffs.

*J. G. Markland and C. S. Bradley*, for defendants.

CLIFFORD, J. Persons uniting under this act to carry on the business of banking, are required to enter into articles of association, and it is expressly enacted that the articles may contain any other provisions, not inconsistent with the act, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs; and it requires no argument to show that the provision contained in the articles of association, if valid, did authorize the directors, if they saw fit, to prohibit by by-laws the transfer of stock owned by any stockholder who was liable to the association, either as principal debtor or otherwise, without the consent of the directors. Beyond all doubt, the provision in question was incorporated into the articles of association by virtue of the power conferred by § 5 of the act author-

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izing such associations, and which requires the persons forming the same to enter into articles specifying the object for which the association is formed, and also allows the association to incorporate any other provision into the articles, not inconsistent with the act, which the association may see fit to adopt for the regulation of the business and the conduct of its affairs. Search is made in vain for any provision of the act inconsistent with the provision in question, as incorporated into the articles of association, and if none can be found, then it is clear that the power of the directors to adopt the by-law is beyond all doubt, as the language of the provision of the fifth article is as full and explicit to that effect as could well be chosen.

Direct authority is conferred upon the directors of the bank to define and regulate by by-laws, not inconsistent with the provisions of the act, the manner in which stock shall be transferred, its general business conducted, and all the privileges granted by the act to associations under it shall be exercised and enjoyed, and it is contended by the defendants, that the power of the directors to adopt the by-law in question may be sustained, as warranted by that provision. Suppose they are in error in that regard, still it is clear that § 8 of the act is not inconsistent with the provision contained in the articles of association, which in terms gives that power to the directors, and if not, then the defendants are justified in having refused to record the transfer of the stock, as it is sufficient for their defence that the directors possessed the power to adopt the by-law whether they derived it from § 8 of the act, or whether they derived it from the special provision incorporated into the articles of association under the power conferred upon the association by § 5. Banking associations, unless prohibited by their charter, may provide that the shares of their stock shall not be transferable until the shareholder shall discharge all the debts due by him to the association; and it is well settled that such a by-law, if adopted by proper authority, includes the liabilities of the shareholder which have not matured, as well as those payable on demand. Such a provision creates a valid lien against an assignee of the stock, even where the shareholder is only under a contingent liability, if the as-

signee takes the stock with notice of the lien, and gives no notice to the bank of the transfer until the liability has become fixed. *Leggett v. Sing Sing Bank*, 24 N. Y. 286. Power was given to the Hudson Bay Company by their charter to make by-laws for the better government of the company, and for the management of their trade, and they made a by-law that if any of their members should be indebted to the company his company-stock should be liable in the first place for the payment of such debts as he might owe to the company, and that the company might seize and detain the stock as security for such indebtedness. In a contest between the assignees in bankruptcy of the shareholder and the company the by-law was adjudged good upon the ground that the legal interest in all the stock was in the company. *Child v. Hudson Bay Co.* 2 P. Williams, 207; Angell & Ames on Corp. (4th ed.) 386.

Where the charter of a bank provided that the shares of the capital stock should be transferable only on the books of the bank according to such rules as the directors should establish, and also provided that all debts actually due and payable to the bank by a stockholder requesting a transfer, must be satisfied before such transfer should be made, the Supreme Court held that no person could acquire a legal title to any shares except under a legal transfer according to the rules of the bank, that if any person took an equitable assignment it must be subject to the rights of the bank under the act of incorporation, of which he was bound to take notice. *Union Bank v. Layrd*, 2 Wheat. 393. Provisions to the same effect were also contained in the charter of the Bank of Washington, and the same court, twenty years later, held, in a contest between The United States and the bank, that every shareholder of a bank who draws or indorses a note to procure a loan from the bank, is bound to know the terms of the charter and by-laws; and his signature, if it is so provided in the charter, is an inchoate pledge of his stock as security for such paper; that his stock gives credit to the loan, and that the bank under such circumstances grants the loan on the faith of that security. . *Brent, etc., v. Bank of Washington*, 10 Pet. 615. Shares in a bank whose charter provides that they

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shall be transferable only at its bank, and on its books, cannot be effectually transferred, as against a creditor of the vendor, who attaches them without notice of any transfer by a delivery of the certificates, together with an assignment and a blank power of attorney from the vendor to the vendee, even if notice of such transfer be given to the bank before the attachment. *Fisher v. Essex Bank*, 5 Gray, 379. Many other cases might be referred to where it is held that all persons unaffected with notice to the contrary, are at liberty to act upon the faith of the title being where it appears to be upon the books of the bank. *Sabin v. Bank of Woodstock*, 21 Vt. 353; *Oxford Turnpike v. Bunnell*, 6 Conn. 558; *Perpetual Ins. Co. v. Goodfellow*, 9 M. 150; *Cunningham v. Life Ins. & Trust Co.*, 4 Ala. 652; *Tuttle v. Walton*, 1 Kelly (Ga.), 43; *Arnold v. Suffolk Bank*, 27 Bar. 424; *McCready v. Rumsey*, 6 Duer, 574. Unquestionably, when the stock of a corporation is by the terms of its charter or by laws transferable only on its books, still the purchaser who receives a certificate with power of attorney, acquires the entire title, legal and equitable as between himself and the seller, with all the rights which the latter possessed, but as between himself and the corporation he acquires only an equitable title which the corporation are bound to recognize whenever he presents himself, if before any effective transfer to another has been made on the books, and offers to do the acts required by the charter and by-laws to make a valid transfer, until those acts are done, he is not a stockholder, and has no claim to act as such; but possesses, by virtue of the certificate and power of attorney, as between himself and the corporation, the right to make himself, or whomsoever he chooses, a stockholder by complying with the rules prescribed in the by-laws or charter. *Railroad v. Schuyler*, 34 N. Y. 80.

Complete justification for the act of the defendants in refusing to recognize and record the transfer of the stock in this case, is found by the Supreme Court of the State, as well in the power granted to the corporation to define and regulate by by-laws the manner in which its stock shall be transferred, as well as in the express power contained in the articles of association, that the

directors may, if they so determine, prohibit by by-laws the transfer of stock owned by any stockholder who may be liable to the association, either as principal debtor, or otherwise, without the consent of the board; and many other decided cases proceed upon the same ground, but it is not necessary in this case to assume the burden of the first branch of the proposition, as the by-law conforms to the articles of association, and it is clear that the provision in the articles of association, under which the by-law was framed, is fully warranted by the act of Congress, providing for a national currency. *Lockwood v. The Banks*, 9 R. I. 308; *Walns v. Bank of North America*, 8 S. & R. 86; *McDowell v. Bank of Wilmington*, 1 Harring. 27; *Stebbins v. Phoenix Fire Ins. Co.*, 3 Paige, Ch. 350.

Somewhat different views were entertained by the Court of Appeals of New York in the case of *The Bank of Attica v. Manufacturers' & Traders' Bank*, 20 N. Y. 504, which is much relied on by the plaintiffs. Stockholders of banks, formed under the general banking act of that State, were, it appears, at that time vested with the unconditional right of transferring their stock, except as they might agree to limit it by their articles of association. Such transfers were required by the articles of association to be made upon the books of the bank; and the provision was, that "every transfer shall be made and taken, expressly subject to all the conditions and stipulations contained in those articles. Suitable books for the registry and transfer of the shares of the association, were required to be kept by the directors, and they were empowered "to make such by-laws and regulations for the government of themselves, their officers and agents, and for the management of the business of the association, as they may deem expedient and proper, not inconsistent with law, or these articles of association," but the articles did not in terms give the direction and power to provide that the stock should be subject to the lien of the corporation for the indebtedness of the stockholders, and the court held that the articles of association did not authorize the directors to adopt a by-law, making provision for such a lien, and that a purchaser of the stock, notwithstanding the directors had adopted such a

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by-law, had an equitable lien to the stock, free from any lien in favor of the bank. Whether the rule adopted in that case is correct or incorrect, the case before the court is wholly unaffected by that decision, as the power, under which the directors in this case adopted the by-law in question, is contained in the article of association, and was incorporated into those articles of association, in pursuance of an express provision contained in § 5 of the act of Congress, to provide for a national currency.

Express authority to restrain the transfer of the shares by the shareholders was entirely wanting in the articles of association in that case, and the justification of the act of refusal to recognize the same rested entirely upon a by-law adopted by the directors, which provided that no transfers of stock could be made unless the person making the same shall previously discharge all debts or demands due or contracted by him or her to the bank. Strictly confined as the opinion is in that case to the question before the court, still it is manifest that the court felt obliged to concede that the section of the banking act which provides that the shares should be transferable upon the books of the bank in such manner as might be agreed upon in the articles of association, would allow such a restraint to be inserted in those articles, but they held that the directors could not make such a by-law in a case where the articles of association conferred no such authority. Much weight is certainly due to that distinction, as the articles of association must receive the assent of all the primary stockholders, and are within the knowledge of every purchaser of the stock; but it is not necessary to decide in this case whether the directors could properly adopt such a by-law or not, in a case where they are not authorized so to do by the articles of association. They were authorized by the articles of association in this case to adopt the by-law in question, and it is expressly admitted in the case of *Rosenback v. The Salt Springs National Bank*, 53 Barb. 505, that where the articles of association confer the power to make such a by-law, that the by-law is valid, and that it binds the subsequent purchaser of the stock, and the court is not referred to any decision where a contrary doctrine is mentioned. Comment upon the provisions of the prior act of Congress is un-

necessary, as that is repealed, and the case before the court is governed entirely by the act now in force. 12 Stat. at Large, 665; 13 Ibid. 118. Banking associations, formed under the act of Congress, are forbidden by § 35 of the act to make any loan or discount on the security of the shares of its own capital stock, or to be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss, upon a debt previously contracted in good faith. 13 Stat. at Large, 110.

Just such a provision is contained in the banking law of the State of Connecticut, where it is enacted that no bank shall make any loan or discount on pledges of its own stock, and the Supreme Court of that State held that that enactment did not invalidate a provision in the certificates that the stock of the shareholders should be subject to their indebtedness to the incorporation, that a loan or discount on a pledge of stock is an expression of mercantile origin, and is understood to mean a loan or discount, where the stock of the person for whose benefit the loan or discount is made, or that of another is expressly and specifically pledged at the time for its payment. *Van Sands v. Middlesex Co. Bank*, 26 Conn. 144. Such a provision, forbidding loans on such security, is not inconsistent with the power conferred in the articles of association, as was held by the Supreme Court of Ohio in the case of *Conant et al. v. Seneca Co. Bank*, 1 Ohio St. R. 298, to which particular reference is made, as showing the reasons upon which the conclusions rest. *In re Bigelow*, 1 B. R. 203; *Ex parte Plant*, 4 Dea. & Chitt. R. 160. Congress undoubtedly intended in repealing the provision in § 36 of the former act, that no shareholder in any association under the act should have power to sell or transfer any shares held by him, in his own right, so long as he should, either as principal debtor, surety, or otherwise, be liable to the association for any debt which should have become due, and remained unpaid, etc., to relieve the holders of bank shares from the restrictions imposed by that section, and in a case where the articles of association did not contain any provision authorizing the directors to adopt a by-law providing for such restraint in the sale and transfer of shares, the Supreme Court held, that loans made by national



banks do not give a lien to the bank on the stock of such stockholders, but the articles of association in the case at bar do confer that authority upon the directors, and the directors, having exercised that power under the authority conferred in the articles of association, and adopted the by-law in question, the same is clearly valid, and furnishes a complete justification to the defendants for their refusal to record the transfer of the stock, as demanded by the plaintiff. *Bank v. Lanier*, 11 Wall. 374.

Prior to the repeal of the antecedent act, the directors in that case had adopted a by-law providing for such a restraint in the sale and transfer of the stock owned by a delinquent stockholder ; but the Supreme Court held that the repeal of the prior act, inasmuch as it removed the restriction, left the by-law without any foundation, and the by-law, which provided for the same restriction, also fell with the repeal of the act on which it rested.

Well-founded doubt as to the correctness of that decision cannot be entertained, as the by-law was adopted under the act of Congress, which was repealed, and not under the articles of association, which did not confer any power upon the directors to adopt any such restriction. But the facts in the case at bar are entirely different, as the articles of association in this case expressly provide that by-laws may be adopted which shall "prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder who may be liable to the association, either as principal debtor or otherwise, without the consent of the board." Opposed to this conclusion, it may be suggested that the shares of a stockholder are evidenced by certificates ; that such certificates are sometimes used as collaterals, and that they are bought and sold in the market, and that a person purchasing without due inquiry may suffer loss. But if that suggestion is made, there are two answers to it, either of which is decisive : —

That such certificates are not negotiable instruments. Such a certificate does not partake of the character of a negotiable instrument ; and the *bona fide* assignee of the same, with power to transfer the stock, takes the certificates as a contract, subject only to the equities which existed against his assignor. *Me-*

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Seavey *et al.* v. Seymour.

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*chanics Bank v. Railroad*, 3 Kern. 623; *Bank v. Lanier*, 11 Wall. 377; *Bank of Georgetown v. Laird*, 2 Wheat. 393; *Stebbins v. Ins. Co.*, 3 Paige, Ch. 350.

That a purchaser cannot acquire any greater rights than his grantor possessed, as all persons dealing in the stock of a bank are bound to take notice of the charter, or articles of association, which is a proposition too generally admitted to require argument in its support.

Seven only of the eight directors were present at the meeting when the by-law in question was adopted, and it is objected by the plaintiffs that the by-law is inoperative on that account; but the response made by the defendants to that objection is so full and decisive that it does not seem to be necessary to enter into that inquiry. Most of the authorities upon the subject are referred to in the supplemental argument by the defendants, and they show, in the judgment of the court, that the objection, as applied to the facts of the case at bar, is not well founded.

Judgment for the defendants, with costs.

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## MAINE DISTRICT.

SEPTEMBER TERM, 1871.

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BEFORE CLIFFORD AND SHEPLEY, JJ.

JOHN T. SEAVEY, as father of JOHN E. SEAVEY, minor, Petitioner for *Habeas Corpus v.* T. SEYMOUR, Military Commander at Fort Preble; WILLIAM K. HARRINGTON, as father of CHARLES W. HARRINGTON, Petitioner *v.* Same.

Under § 14 of the Judiciary Act, justices of the Supreme Court and District Courts have power to grant writs of *habeas corpus* where a person is imprisoned or restrained of his liberty, for the purpose of inquiry into the cause of the commitment; but the writ in no case extends to prisoners in jail, unless when they are in custody under or by color

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of the authority of the United States, or are committed for trial before some court of the same, or are to be brought into a court to testify.

Under that act a Circuit Court has no authority to re-examine a decision of a District Court.

The first section of the act of February 5, 1867, confers upon all the Judges and Justices of the Courts of the United States, in addition to the authority previously conferred, power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution or any law or treaty of the United States, and gives an appeal from the decision of an inferior to the Circuit Court.

In case of the enlistment into the service of the United States, without the consent of parent or guardian, of a person under eighteen years of age, on a hearing under a petition for a writ of *habeas corpus*, parol evidence is admissible to show the age of the recruit.

The certificate of enlistment is not conclusive that the recruit was of age sufficient to enter into the contract.

The first proviso of § 20 of the act of February 24, 1864, does not vest the exclusive jurisdiction of applications of this nature in the Secretary of War.

If the recruit was under the age of eighteen years, his certificate under oath that he was of the age required for lawful enlistment, would not be conclusive as to the actual fact.

The act of March 8, 1815, repealed the act of December 10, 1814, which made the enlistment binding upon all persons under the age of twenty-one years as well as upon persons of full age.

By the act of the 24th of February, 1864, the Secretary of War is empowered to order the discharge of all persons in the military service who are under the age of eighteen years at the time of the application for the discharge, provided it appears on due proof that such persons are in the service without the consent of parent or guardian, provided bounties, advance, etc., are first repaid to the government and the local authorities.

But this does not give the Secretary of War exclusive jurisdiction of such applications.

This provision giving the Secretary of War power to hear such applications, is not repugnant to, or a repeal of, § 14 of the Judiciary Act.

In order to work a repeal by implication there must be a positive repugnancy between the provisions of the older and later statute.

Upon an application for a writ of *habeas corpus* before the District Court, there was no defence that the recruit was awaiting a trial under a charge of desertion before a military court, and no evidence to that effect introduced before that court: Held that at the hearing of the appeal before the Circuit Court, the suggestion that that fact was shown by the return could not avail the respondent, because the jurisdiction of the Circuit Court in this case was purely appellate.

The return on the writ should be signed by the person to whom it was directed.

The proper course is for the petitioner to make his answer to the return on the writ, and not to make his allegations in full in the petition.

All the facts necessary to an understanding of the case are recited in the opinion.

*Strout and Gage*, for petitioners.

*T. F. Barr and A. B. Gardiner*, for the United States.

CLIFFORD, J. Provision is made, by § 14 of the Judiciary Act, that either of the justices of the Supreme Court, as well as the judges of the District Courts, shall have power to grant writs of

***Habeas corpus*** “where a person is imprisoned, or restrained of his liberty,” for the purpose of an inquiry into the cause of commitment; but the same section provides that the writ “shall in no case extend to prisoners in jail, unless when they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.” 1 Stat. at Large, 82.

Circuit Courts, under that act, possess no power to re-examine a decision of the District Court, as the act makes no provision for the removal of such a case from the District to the Circuit Court by writ of error or appeal; and the reported decisions of the Circuit Court do not show a case where appellate jurisdiction in such a case was ever exercised in a Circuit Court.

Appellate jurisdiction is exercised in such cases by the Supreme Court over the decisions of the Circuit Courts, as appears by many reported cases; but the Circuit Courts have never claimed to exercise the power to re-examine the decisions of the District Courts in such cases under the Judiciary Act.

Tested by the regulations prescribed in that act, it is clear that the appeal before the court should be dismissed, as the Circuit Courts would possess no jurisdiction to re-examine the decisions of a District Court in such a case; but § 1 of the act of the 5th of February, 1867, confers the power upon all of the justices and judges of the courts of the United States, in addition to the authority previously conferred, to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law, of the United States; and the provision is, that, from the final decision of any judge, justice, or court inferior to the Circuit Court, an appeal in such case may be taken to the Circuit Court for the district in which said cause is heard, under the regulations prescribed in the same section. 14 Stat. at Large, 383.

Pursuant to that provision, the appellee, on the 10th of September, 1870, filed his petition under oath, in the District Court for this district, praying that a writ of *habeas corpus* might issue in the case before the court, to bring into court the body of the person named in the petition, and that he, the person so named, might be discharged from his confinement.

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He represented in his petition that he, the petitioner, was the father of the person so named ; that his son was a minor under the age of eighteen years, and that he, the petitioner, was entitled to the custody and services of his son ; that he, the son, was unlawfully imprisoned and restrained of his liberty by the appellant at Fort Preble, in this district ; that he, the petitioner, was informed that the appellant claimed to hold his son under and by virtue of a pretended enlistment into the army of the United States, but alleged that the enlistment, if any such is set up, is illegal and void, because, as he alleged, his son was at the time, and now is, a minor under the age of eighteen years, and not emancipated ; and that he, the son, did not have the consent of the petitioner to the said enlistment. Return was made to the writ that the person named was held at the alleged place of confinement by reason of his being a regularly enlisted soldier in the army of the United States, and that he is also awaiting trial on a charge of desertion.

Express authority is given in the act to the petitioner to deny, under oath, any of the material facts set forth in the return, and to allege any fact to show that the detention is in contravention of the Constitution, or any laws, of the United States. Hearing was had in the District Court, and the District Court decided that the enlistment of the person named in the petition was void, as it appeared that he was at the time of the hearing, as well as at the time of his enlistment, a minor under the age of eighteen years ; and the District Court entered an order or decree that the person so named be discharged from his said confinement.

Due appeal was thereupon taken from that decision of the District Court to this court, and the appeal was duly entered at the last term. Since that time the parties have been heard, and the case now comes up for final determination. Certain irregularities are noticeable in the proceedings on the one side and the other ; but the case will be examined and decided as if none such appeared, as they have been substantially waived by the parties.

Power to grant writs of *habeas corpus* is conferred upon the several justices and judges of the courts of the United States b

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§ 1 of the act of 1867, in addition to their authority in that behalf under prior laws, in all cases where any person is restrained of his or her liberty in violation of the Constitution, or of any treaty or law, of the United States ; and it is clear that an appeal in all such cases, where the petition is commenced in the District Court, will lie from the final decision of that court in the case to the Circuit Court of the United States for the district in which the cause was heard. *Ex parte Yerger*, 8 Wall. 102.

Justices and judges of the Federal Courts are empowered, by § 14 of the Judiciary Act, “to grant writs of *habeas corpus* for the purpose of inquiry into the cause of commitment” ; but the additional power conferred by § 1 of the act under consideration is “to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law, of the United States” ; and the further provision is, that the court or judge granting the writ “shall proceed in a summary way to determine the facts of the case by hearing testimony and the arguments of the parties interested ; and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty. 14 Ibid. 386 ; *Ex parte Watkins*, 3 Pet. 201 ; *Ex parte Metzger*, 5 How. 176 ; Hurd on Hab. Corp. 50.

Appeals to the Circuit Courts lie under that act from the final decisions of the District Courts, but an appeal does not lie from the decision of the District Court in such a case where the jurisdiction of the District Court is derived solely from § 14 of the Judiciary Act.

Documents, purporting to be the original enlistment of the recruit, were introduced in each case, and they are so exactly like in all particulars, which are material in this investigation, that a reference to one will be sufficient without any reference to the other. Take, for example, the enlistment of the recruit first named. He states his name, place of birth ; that he is aged twenty-one years ; also his occupation, and acknowledges that he voluntarily enlisted on the 6th of June, 1869, as a soldier in the

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army of the United States for the period of five years, unless sooner discharged by proper authority, and agrees to accept such bounty, pay, rations, and clothing as are or may be established by law. Superadded to that certificate of enlistment is the certificate of an oath purporting to have been taken by the recruit on the same day, in which he, as represented, does solemnly swear that he will bear true faith and allegiance to the United States; that he will serve them honestly and faithfully, and that he will observe and obey the orders of the President, and the orders of his superior officers.

Those documents are admitted to be genuine, but they do not contain any certificate that the recruits, or either of them, did, at the time of their enlistment, take and subscribe any oath according to their respective ages, as seems to be contemplated in such cases, by a recent act of Congress. 12 Stat. at Large, 339. Appended to each document is a paper purporting to be a certificate of an oath, subsequently taken by the recruit, in which he certifies that he, at the time of his enlistment, was twenty-one years of age, but the United States do not contend that such certificates are a part of the enlistments, nor do they rely on them as conclusive evidence of what is therein certified.

On the contrary, they concede that the recruits respectively were, at the time of their enlistment, and that they still are, under the age of eighteen years, if evidence to that is admissible, which they deny, and insist that parol evidence is not admissible to prove that allegation.

Views diametrically opposite are entertained by the respective parties in this case, as appears by a comparison of the several propositions submitted by their counsel at the argument.

Based on the state of facts here exhibited, the proposition of the petitioner is, that the enlistment of his son was in violation of § 2 of the act of the 13th of February, 1862, and void, as he was under the age of eighteen years, and that it was the duty of the District Court to grant the writ of *habeas corpus*, and to discharge his son from his imprisonment.

Two principal answers are made by the Government to that proposition, and if either of them can be sustained, the decision of the District Court must be reversed.



1. That the evidence offered as to the age of the recruit at the **time** of his enlistment, is not admissible; that the certificate of **enlistment**, as given in evidence, is conclusive that the recruit **was** of sufficient age to make the contract. 12 Stat. at Large, 339.

2. That the first proviso in § 20 of the act of the 24th of **February**, 1864, operates to vest in the Secretary of War the **exclusive** jurisdiction to hear and determine such an application. **13** Stat. at Large, 10; 13 Ibid. 380.

Where the recruit is less than eighteen years of age, and was **m**ustered into the military service without the consent of his **p**arent, guardian, or master, proof to show that fact has always **b**een admissible in evidence, except for the period of three **m**onths, as hereafter explained, from the organization of the **j**udicial system of the United States to the present time, and it **i**s still admissible under the rules of law, unless it can be held **t**hat the act which provides that "the oath of enlistment taken **b**y the recruit shall be conclusive as to his age," has established **a** different rule. 12 Stat. at Large, 339.

Strong doubts are entertained whether that provision can have **a**ny application in any case where the writ of *habeas corpus* is **s**ued out by the parent, guardian, or master, but it is unnecessary **t**o determine that point in the case before the court, as it does **n**ot appear that the respective recruits did take any oath as to **t**heir age at the date of their enlistment. As before explained, **t**hey severally made oath that they would bear true faith and **a**llegiance to the United States; that they would serve them **h**onestly and faithfully, and that they would observe and obey **t**he orders of the President and the orders of their superior **o**fficers; but they do not, as appears by the certificate of enlistment, **m**ake any representation under oath as to their respective **a**ges.

Construed literally, the phrase that "the oath of enlistment **t**aken by the recruit shall be conclusive as to his age," it may be **c**onceded, would afford some support to the theory of the respon-  
**d**ent, that the evidence offered to show that the recruits were **u**nder eighteen years of age, was inadmissible, but it cannot be **a**dmitted that Congress intended to enact that the enlistment,

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with or without such a certificate, should be conclusive evidence that a given relation exists between the United States and a citizen, when the same section of the act of Congress enacts that the party in question shall never hold any such relation as that imputed.

Even suppose the phrase in question may be construed as enacting in respect to recruits between the ages of eighteen and twenty-one, that the enlistment shall be conclusive that they were competent to make such a contract, which is not admitted where the petition is filed by the parent, guardian, or master still it is clear that it cannot properly be so construed in respect to recruits under the age of eighteen years, as the same section enacts, "that no person, under the age of eighteen, shall be mustered into the service of the United States."

Congress, in the opinion of the court, could never have intended to enact that the certificate of enlistment should be conclusive as to the validity of the contract, in a case where the recruit is declared not competent to be mustered into the military service, by the same section that contains the provision which it is supposed excludes the evidence to prove its invalidity. Such a construction, if not positively absurd, would certainly violate one of the acknowledged canons of construction, which forbids that any part of a statute shall be held to be without meaning, as it is clear that that consequence must follow if such a view is adopted as to the meaning of that phrase.

Support to the opposite view is also derived from the consideration, that if the rule assumed by the respondent may be applied where the recruit is under the age of eighteen, it may, with equal propriety, be applied when the enlistment is of a recruit under sixteen years of age, in which case the recruiting or mustering officer, if he acted knowingly, is liable to be dismissed the service, with forfeiture of pay and allowances, and "shall be subject to such further punishment as a court martial may direct." 13 Stat. at Large, 380.

Recruits, it seems, are sometimes required to make oath as to their age at the time of their enlistment, and sometimes they are not, as is sufficiently shown by the enlistments and the certifi-

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ates appended to the same in these cases. Attempt was made in argument to show that the enlistment never contains any such statement of the recruit, but the reports of judicial decisions furnish satisfactory evidence to the contrary, as appears by several cases. *In re Cline*, 1 Ben. R. 338; *In re Stokes*, 1 Ibid. 341; *In re Riley*, Ibid. 408.

Evidently the enlistment cannot, in any case, be regarded as conclusive of the age of the recruit unless it contains the certificate of the recruit under oath that he was of the required age, and the court is of the opinion that even where it contains such certificate it cannot have the effect to exclude evidence as to the actual fact, if the recruit was under the age of eighteen years at the time of his enlistment, as the same section provides "that no person under the age of eighteen shall be mustered into the United States service."

Express provision is made by § 11 of the act of March 16, 1802, that no person under the age of twenty-one years should be "enlisted or held" in military service without the consent of his parent, guardian, or master, if any he had, and the same section enacted that if any officer should enlist any person contrary to the true intent and meaning of that act, he should be liable to the penalty therein provided. 2 Stat. at Large, 135. Many changes were subsequently made in the details of that regulation, and especially during the war of 1812, not material to be noticed, as one of them contains a re-enactment of the substance of the original provision, and no one of them authorized the enlistment of a minor under the age of eighteen without the consent of the parent, guardian, or master, until the act of the 10th of December, 1814, was passed, which was approved only fourteen days before the treaty of peace was signed. 3 Stat. at Large, 146; 8 Stat. at Large, 218; 2 Ibid. 792.

Consent in writing of the parent, guardian, or master, was required by the act last referred to, which was a supplementary act for the more perfect organization of the army during that war. Throughout that period it is clear that persons under the age of eighteen could not be enlisted or held to service in the army without the consent, oral or written, of the parent, guar-

dian, or master; but § 1 of the act, making further provision for filling the ranks of the army, authorized commissioned officers in the recruiting service to enlist into the army any free, effective, able-bodied men between the ages of eighteen and fifty years, and the provision was that the enlistment should be absolute and binding upon persons under the age of twenty-one years, as well as upon persons of full age, where it appeared that the recruiting officer had complied with all the requisitions of the laws regulating the recruiting service. 3 Ibid. 146. Provision was also made by § 3 of the act, that so much of § 5 of the prior act as required the consent in writing of the parent, guardian, or master to authorize the enlistment of persons under the age of twenty-one years, "shall be, and the same is hereby repealed." Such consent in writing, after that, was certainly no longer necessary, and perhaps the better opinion is, that persons under the age of twenty-one years might be enlisted into the army under that act without any such consent, oral or written, as that required under prior laws. Concede all that, still it is clear, as is expressly admitted by the respondent, that the act repealing the provision requiring such consent was itself repealed by § 7 of the act fixing the military peace establishment, which became a law in less than three months after the provision in question was repealed. 3 Stat. at Large, 225.

War had then terminated, and Congress proceeded without delay to reduce the army, as the Congress on the 16th of March, 1802, had previously done, re-enacting many of the provisions of the former law, and prefixing the same title to the new act.

By § 1 of that act it was provided, that the military peace establishment should consist of such proportions of artillery, infantry, and riflemen, not exceeding in the whole ten thousand men, as the President should judge proper, and that the corps of engineers as then established should be retained.

§ 4 of the same act prescribes the compensation, subsistence, allowance, etc., of the officers, non-commissioned officers, privates, etc., in the new military peace establishment, and provides in express terms that they shall be the same, except in certain particulars not material to be noticed, as are prescribed

in the old law upon that subject. All the corps retained by that act were declared "to be subject to the rules and articles of war," and § 7 provides that "they shall be recruited in the same manner, and with the same limitations . . . . as are authorized" by the before-mentioned old law upon the same subject, and the act to raise for a limited time an additional military force. 2 Stat. at Large, 481.

Nothing can be plainer than the proposition that the new act fixing the military peace establishment of the 3d of March, 1815, repealed that part of § 1 of the act of the 10th of December, 1814, which made the enlistment absolute and binding upon all persons under the age of twenty-one years; as well as upon persons of full age.

Were counsel permitted to re-argue the case, it might perhaps be suggested that the court, in the case of *Riley*, 1 Ben. R. 415, decided that the act of the 10th of December, 1814, is still in force and unrepealed; but it would be a sufficient answer to that suggestion, if made, that the court, though it gave a pretty thorough review of the acts of Congress upon the subject, did not refer to the act of the 3d of March, 1815, which is the repealing act, as is admitted by the counsel for the respondent.

Obliged to concede that the act of the 10th of December, 1814, was repealed by the act of the 3d of March, 1815, the next proposition of the appellant is that the latter act was also repealed by subsequent acts of Congress. Support to that proposition is attempted to be drawn from the act of the 2d of March, 1821, and from the act of the 2d of March, 1833, the act of the 23d of May, 1836, and the act of the 5th of July, 1838, but it is so obvious that the proposition finds no such support as is supposed from anything contained in any one of those acts of Congress, or from the whole combined, that it is not deemed necessary to reproduce any of their provisions. 3 Ibid. 615; 4 Ibid. 647; 5 Ibid. 32; 5 Ibid. 256.

Attention is also called to three opinions of the Attorneys General, but the inquiries presented in those cases were widely different from the one before the court, and it is quite evident that the particular question involved in this proposition was not

examined at all in either of those cases. 5. *Opinions*, 313; 6 *Opinions*, 474; 6 *Ibid.* 607.

Power was conferred upon the Secretary of War, by § 5 of the act of the 28th of September, 1850, to order the discharge of any soldier of the army of the United States who, at the time of his enlistment, was under the age of twenty-one years, upon evidence being produced to him that such enlistment was without the consent of his parent, guardian, or master; but it is too clear for argument that, that provision did not have the effect to repeal or modify § 14 of the Judiciary Act. 9 Stat. at Large, 507.

Express authority is also conferred upon the Secretary of War by § 20 of the act of the 24th of February, 1864, to "order the discharge of all persons in the military service who are under the age of eighteen years at the time of the application for their discharge, when it shall appear, upon due proof, that such persons are in the service without the consent, either express or implied, of their parents or guardians," provided the applicant, his parent or guardian, shall first repay to the government, and to the state and local authorities, all bounties and advance pay received by him in consequence of his enlistment. 13 Stat. at Large, 10.

"May order the discharge," etc., are the words of that provision, but Congress subsequently enacted that it should be construed to mean that the Secretary of War "shall discharge minors under the age of eighteen years under the circumstances and on the conditions prescribed in § 20 of the former act." 13 *Ibid.* 380.

Military officers are forbidden, by the same section of the act just named, to enlist or muster into the service any person under the age of sixteen years, with or without the consent of the parent or guardian; and the further provision is, that such person, if so enlisted or recruited, shall be immediately discharged upon repayment of all bounties received, and that such recruiting or mustering officer who shall knowingly enlist any person under sixteen years of age, shall be discharged the service, with forfeiture of pay and allowances, and shall be subject to such further punishment as a court-martial may direct.

Beyond all doubt the effect of that enactment is to make it the duty of the Secretary of War, under the circumstances and on the conditions prescribed, to discharge such persons who are under the age of eighteen years at the time of their application, when it shall appear, upon due proof, that such persons are in military service without the consent, either express or implied, of their parents or guardians, as provided in the former act, and the appellant contends that it vests in the Secretary of War the exclusive jurisdiction to hear and determine such an application, but the court is entirely of a different opinion.

Important and inalienable liberties and privileges were either granted or secured to every order of men in the parent country, by the great charter, whose crowning glories are those essential principles which protect the personal liberty and property of all the subjects, by giving security from arbitrary imprisonment, and from forcible spoliation, without due process of law.

Centuries afterward, the declaratory statute, called the petition of right, was passed, by which it was designed to subject even the sovereign to the power of the law, and bring the right of personal liberty within legal protection, and to afford additional guarantees against arrest without due process, illegal restraints, and arbitrary commitments.

Special reference ought also to be made to another fundamental principle which, with the two others previously mentioned, constitute the constitutional safeguards of personal liberty in the parent country.

Prior to that enactment the courts had decided they could not grant *habeas corpus* either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council. 3 Bl. Com. 134.

Indignant at such a decision, the parliament enacted that any person committed even though by the king himself, in person, or by his privy council, should have granted unto him, without any delay upon any pretence whatsoever, a writ of *habeas corpus*, upon demand or motion made to the court of King's Bench or Common Pleas, and that thereupon the court, within three court days



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after the return is made, should examine and determine the legality of such commitment, and should do what to justice might appertain in delivering, bailing, or remanding such prisoner. 3 Ibid. 135.

Throughout that period, however, notwithstanding the errors of judicial decisions, and the culpable delays in the administration of justice, the writ of *habeas corpus* was the chief if not the only reliance of the citizen against illegal restraint and unlawful imprisonment.

Partial remedy for such evils in judicial administration was provided by the statute just referred to, which gave the courts jurisdiction, even though the commitment was made by the king or privy council, but other abuses had also crept into daily practice which had in some measure defeated the benefit of that great constitutional remedy.

Judicial errors of the kind mentioned, when committed at still later period, had the effect to arouse parliament a second time to a sense of the incalculable importance of that essential safeguard of civil liberty, which finally led to the enactment of the statute ever since known as the *habeas corpus* act, and as the second great charter of that country for the protection of the citizen from unlawful imprisonment, and the aggressions of arbitrary power.

Reference is here made to judicial decisions and parliamentary acts, which preceded even the discovery of our own country; but when our ancestors immigrated here they brought with them, as a part of the common law, those great and essential guaranties and safeguards of civil liberty against unlawful imprisonment and arrest, without due process of law. They claimed the full possession of the rights, liberties, and immunities of British subjects, and, in their early legislative assemblies, insisted upon a declaratory act, acknowledging and confirming such rights, liberties, and immunities. 1 Story on Const. (3d ed.) § 165; Ancient Char. 43 & 214.

Guaranties and safeguards equally effectual are also found in the Constitution of Massachusetts adopted in 1870, before the convention assembled which framed the Federal Constitution. Gen. Stat. Mass. 15-31.

When the Constitution was ordained, it was declared by the framers that one of the purposes for which it was established was to secure the blessings of liberty ; and it also provides that the privilege of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it ; that the trial of all cases of impeachment shall be by jury ; that no person shall be held for a capital, or otherwise infamous, crime, unless on a presentment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. Very strong doubts are entertained whether Congress could constitutionally pass a law giving the exclusive power to the Secretary of War to hear and determine such cases as those mentioned in the petitions before the court ; but it is quite unnecessary to determine that question, as the court is of the opinion that the provision which requires the Secretary of War to discharge such persons, when applications are made to him, is in no respect repugnant to § 14 of the Judiciary Act.

Decided cases are referred to which give some support to the opposite theory ; but it is not deemed necessary to give them much examination, as the question, in the judgment of the court, must turn upon the construction of the two acts of Congress previously mentioned, when considered in connection with the act under which the petitions in this case were filed. Applications for discharge in such cases may be made by such minors to the Secretary of War ; and the provision is, that he shall order a discharge if it appears upon due proof that the applicant is in the military service without the consent, either express or implied, of his parent or guardian ; but there is not a word in the section to show that the parent or guardian may not apply to the associate justice of the Supreme Court, or to the circuit judge, or to the district judge for the district, for the same relief which the Secretary of War may grant.

Repeals by implication are never favored. On the contrary, the rule is that there must be a positive repugnancy between the provisions of the new law and the old to work a repeal by implication, and even then the old law is only repealed to the extent

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of such repugnancy. *Wood v. U. S.*, 16 Pet. 363; *U. S. v. Walker*, 22 How. 311; 2 Dwarris on Stat. 533.

Suppose it was otherwise, and that the theory that the authority given to the Secretary of War to discharge such minors is inconsistent with § 14 of the Judiciary Act, still the conclusion would not benefit the appellant, as the petitions in these cases were filed under the act passed three years subsequent to the act which gives that authority to the Secretary of War; and, by the act last mentioned, power to grant writs of *habeas corpus*, in all cases where any person may be restrained of his or her liberty in violation of the Constitution or any treaty or law of the United States, is expressly given to the several courts of the United States, and to the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority conferred by the prior acts of Congress. 14 Stat. at Large, 385.

Such an enactment evidently contemplates a judicial remedy, and indeed the writ of *habeas corpus* is everywhere regarded as a judicial writ, and the only one which is designed to procure liberation from illegal confinement.

By all the forms, the writ is directed to the person detaining another, and commands the person to whom it is directed to produce the body of the prisoner, or person detained, together with the day and cause of his capture and detention, to submit to and receive whatsoever the court or judge awarding the writ may determine in that behalf.

Grant that, and it is still insisted by the appellant that the decree of the District Court discharging the petitioners is erroneous, because the return shows that the petitioners are awaiting trial as deserters; but the decisive answer to that objection is, that no such defence was set up in the District Court, nor was any evidence introduced in that court to support the allegation of the return.

Where the petition is filed and the case heard in the District Court, the case can only be removed into the Circuit Court by appeal, and in that state of the case the jurisdiction of the Circuit Court is wholly appellate.

Power to re-examine the decree of the District Court is all the power in such a case which is possessed by the Circuit Court; and such re-examination must be made upon the same evidence that introduced in the District Court, except in case where competent evidence was offered and excluded which should have been admitted. Errors of the District Court may be corrected; but it was not the intention of Congress, in providing for an appeal, to give the party a new trial, unless the same should be ordered by the appellate court for some error committed by the District Court.

Two irregularities are noticed in the proceedings which were not the subject of remark by either party at the hearing. Subsequently they were discovered by the court, and the attention of counsel was invited to the subject, with leave to each party to file an additional brief. Since that time, briefs on the one side and on the other have been received, and the subject attentively considered.

One of the errors is in respect to the return, which is not signed by the person to whom the writ is directed, nor does it contain any explanation in that behalf. Probably the returning officer is the commanding officer of the military post, and the proper one to make the return, but the necessity for any further inquiry into the matter is obviated by the waiver of the objection by the petitioners.

Petitioners in such a case may deny any of the material facts set forth in the return, or they may allege any fact to show that the detention is in contravention of the Constitution or the laws of the United States. Instead of waiting till the return was made, and then making their answer to it, they set forth their response to it in their petition, but inasmuch as the allegations of the petitions are full and explicit to the point, and are also under oath, the court is of the opinion that the objection ought not to prevail in the appellate court, especially as it was not made in the District Court, nor in the Circuit Court, until the attention of counsel, subsequent to the hearing, was called to it by the appellate court.

The decrees of the District Court are respectively affirmed.

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 Killam v. The Schooner Eri.
 

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 WENTWORTH KILLAM, Libellant, v. THE SCHOONER ERI, OBED B. BOYCE *et als.*, Claimants and Appellants.

Maritime liens are founded in commercial usage, and the proper remedy to enforce them, whether arising from a marine tort or contract, is by a suit *in rem* commenced where the *res* is found.

Jurisdiction *in rem* is exclusive in the District Courts, but the suit may be instituted in the District where the *res* is found, irrespective of where the injury for which satisfaction sought occurred.

A general allegation of negligence in a collision case is, on the part of the libellant's vessel, not sufficient to constitute a valid defence even in pleading. Specification as to what was done or omitted and caused the accident must be made.

A vessel in the evening was lying-to on the starboard tack, with her helm hard a-port, without a competent lookout properly stationed, and with signal-lights fully displayed as required by law. Another vessel was discovered directly ahead. The order was given not to change the helm, and a collision took place. *Held*, that no negligence could be charged to those on board the vessel first named for not keeping her to her course.

Inevitable accident in cases of collision is where a disaster takes place, occasioned exclusively by natural causes, without any fault on the part of the owners or those intrusted with the management of either vessel.

Two vessels were lying-to just prior to a collision, which took place in the night, — one with competent lookout properly stationed, the required signal-lights, on the starboard tack, with helm hard a-port; the other had her red light burning brightly. Just before the collision the green light was burning, but not as brightly as it should have done. In the attempt by an officer to turn it up it went out. It was handed to a seaman, and was only seen on the starboard side by the master when the two vessels were close together. No person was specifically appointed or stationed as a lookout. All the crew were abaft of the mainmast just before the collision. A collision ensued. *Held*, not an inevitable accident, but that the vessel last referred to was in fault.

The rules of navigation require seasonable precautions to avoid danger in collision cases. The ground upon which the vessel in fault in this case was clearly liable was the absence of an appointed and properly stationed lookout.

ADMIRALTY appeal. Libel *in rem* in a cause of collision. Decree in the District Court for libellants. Decree affirmed. Compensation was claimed by the libellant as master, in behalf of the owner of the brig Gilliat, on account of injuries received by the brig in a collision which occurred on September 9, 1869, between the brig and the schooner Eri, whereby the former was disabled and greatly damaged.

Heavily laden with iron, the brig was bound on a voyage from Ardrossan in Scotland to Portland in this district. The schooner was employed in the coasting-trade, and was also bound to Portland to deliver a cargo of staves which she had shipped at Nor-

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olk in the State of Virginia. Both vessels had proceeded in safety until they arrived off the coast of Maine, a day or two previous to the disaster. They both encountered a severe gale the day prior to the collision, which prevented the schooner from coming into the harbor, and caused considerable damage to the masts of the brig as she approached the coast, making it necessary, in the judgment of the master, to reef the main-trysail to keep the vessel to the wind. He lost during the gale the main-top-sail, and the upper and lower fore-topsails, but having reefed and set the trysail, and tried the pumps, he sent one watch below at a quarter before one o'clock, and went below himself for a brief period. On his return to the deck he heard some one forward "singing out." His account of the matter was that at first he did not understand what it was, but that he immediately went on to the top-gallant forecastle, and while there discovered that it was a vessel directly ahead of the brig. Inquiry was at once made by him of the man at the wheel how the helm was, and the witness testifies that he received for reply that it was hard a-port, and that he gave directions that it should not be changed without his orders.

Although the schooner was exposed to the same gale of wind, she rode it out without much if any injury. Some of her deck load was washed overboard, and three or four thousand staves were lost between eight and ten o'clock. Before ten o'clock the violence of the gale abated, but there was still a strong wind, and the schooner remained "hove to" under double-reefed mainsail, the master not feeling safe to make sail on the vessel on account of the sea and the wind. Attempt was made near midnight to work the pumps, but the position of the deck load had been so changed by the sea during the gale that the men could not use the brakes. During that period the master was at the wheel, but the mate with all hands was forward, engaged in the attempt to work the pumps. Subsequently the mate came aft and took the wheel, and the master went forward as far as the middle of the deck, when on looking ahead he saw a light. Unable at first to determine what kind of light it was, he called the pilot, and directed his attention to it, who at once said it was a red

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light, when he, the master, gave the order to port the helm and to loose and hoist the jib as quick as possible. He also directed the watch to let go the main-sheet and to drop the peak, and it appeared that these several orders were promptly obeyed, but it was too late, and the two vessels came together, and the brig received the injuries described in the libel.

*A. A. Strout*, proctor for libellants.

*T. B. Reed*, proctor for appellants.

CLIFFORD, J. Maritime liens are founded in commercial usage, and it is well-settled law, in the jurisprudence of the United States, that the proper remedy of a party to enforce the same, whether the lien arises in consequence of a marine tort or from the breach of a maritime contract, is by a suit *in rem* commenced in the District Court of the United States where the *res* or the offending thing is found. *The Belfast*, 7 Wall. 642. Jurisdiction, where the proceeding is *in rem* to enforce a maritime lien, is exclusive in the District Courts, but the suit may be instituted in any district where the *res* or the offending thing is found, whether the injury for which satisfaction or compensation is sought occurred in that district or elsewhere within the United States, or upon the high seas. Process *in rem* is founded on a supposed right in the thing, and the object of the process is to obtain the thing itself, or a satisfaction out of it, for some claim resting on an alleged proprietary right in the thing which the process commands shall be arrested, and held subject to the final order of the court. *The Commerce*, 1 Black, 580.

[At this point the court reviewed the facts found in the foregoing statement.]

Unquestionably the orders given by the master of the schooner were the proper ones, if they had been seasonably given, to have avoided a collision, and inasmuch as they were promptly obeyed, the conclusion is irresistible that they were too late to effect the desired object. Two defences are set up by the appellants, which are not in all respects consistent, either in theory or in fact: 1. That the collision was occasioned by the negligence of the officers and crew of the brig in not keeping her on her course just before and at the time when the collision occurred. 2. That it was the



Result of inevitable accident, and consequently that the owners of the schooner are not liable for the damages sustained by the brig. Testimony was taken on both sides, and the parties were heard and the District Court entered a decree for the libellant in the sum of \$2,854.80, whereupon the respondents appealed to this court.

Since the appeal the parties have been heard in this court upon the same testimony as that exhibited in the court below. Much comment upon the first defence set up by the respondents is unnecessary, as it finds no substantial support in the evidence. A mere general allegation of negligence, without specifying in what the negligence consisted, is hardly sufficient to constitute a valid defence, even in pleading, and the answer in this case is not much better, as it only alleges that the officers and crew of the brig were negligent in not keeping the vessel on her course, without any specification as to what was done or omitted to be done which caused or promoted the disaster. Suppose, however, that the answer is sufficiently explicit, still it is quite clear that the charge is wholly unsustained by the testimony, as the brig was lying-to on the starboard tack, having a competent lookout properly stationed on the vessel, with her signal-lights fully displayed, as required by law. Further argument upon that topic is unnecessary, as the defence finds no substantial support in the testimony, as is pretty much conceded by the respondents. Inevitable accident was the principal defence to the libel in the District Court, and it is the defence chiefly relied on in this court. Cases of collision arise where the disaster was occasioned exclusively by natural causes, without any fault either on the part of the owners of the respective vessels or of those intrusted with their care and management, and where the facts are so the rule of law is that the loss must rest where it fell, on the principle that no one is responsible for such an accident. *The Pennsylvania*, 24 How. 307; *John Frazer*, 21 How. 194; *The Morning Light*, 2 Wall. 550; *The Shannon*, 1 W. Rob. 463.

Where either party is guilty of negligence or fault, such a rule cannot be applied, as the libellant is entitled to recover if the respondent alone was in fault; and if the libellant alone was in

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light, when he, the master, gave the order to port the helm and to loose and hoist the jib as quick as possible. He also directed the watch to let go the main-sheet and to drop the peak, and it appeared that these several orders were promptly obeyed, but it was too late, and the two vessels came together, and the brig received the injuries described in the libel.

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fault, the libel must be dismissed ; and it is equally clear that the damages must be apportioned between the offending vessels in all cases where both vessels were in fault. Sufficient has already been remarked to show that the brig was not in fault, so that the only remaining inquiry is whether fault is justly imputable to the schooner. Fault is imputed to her in the libel, and if that allegation is sustained the decree should be affirmed, and, if not, it must be reversed, as where neither party is in fault the loss must rest where it fell. Both vessels were lying-to just prior to the collision. Doubts were entertained at the argument whether the fact was so in respect to the brig, but a careful revision of the testimony on that point shows that the allegation of the libel as amended, states the case correctly. Two faults are imputed to the schooner, and, if either of the allegations is sustained, the libellants must prevail. They are as follows : 1. That the schooner had no lookout properly stationed on the vessel. 2. That she had no signal-lights, or that they were not properly displayed just before nor at the time when the two vessels came together. All of the schooner's company were on deck at the time of the collision, but no one of them had been assigned to duty as lookout during any part of the night, and it does not appear that any one of the number was attending to that duty just before the lights of the brig were discovered. On the contrary, they were all abaft the mainmast when the master, having discovered a light ahead, called the pilot and inquired of him what it was, and the case shows that the pilot immediately said it was the red light of a vessel.

Prior to the time when the pilot came on deck at the call of the master, it does not appear that the lights of the brig had been discerned by any person on board the schooner, except by the master, although the vessels were in very close proximity, and the danger of collision was imminent, as is apparent from the testimony of the master, who first discovered the light. By his own testimony, it appears that he gave immediate orders to the man at the wheel to port the helm, and directed the men to hurry forward and hoist the jib as quick as possible, telling them to cut the gaskets if they found it difficult to unfasten

man, showing that the danger, in his view, was a pressing one, and that it called for the utmost promptitude. Before he gave that order he says he noticed that the red light of the schooner was burning brightly in the screen where it belonged, and that he also looked at the green light as he went forward, and that the red light also was burning, but not so brightly as it ought to have been; that he tried to "turn it up," and that it went out entirely; that he then took it down and handed it to the first man he met, and he admits that he does not know that it was again put in the rigging. He subsequently saw that light in the hands of one of the crew on the starboard side of the vessel, but states in the same connection that the jib-boom of the brig was at that time nearly over the schooner. Evidently the time for precautions was past, as the collision was inevitable. Lookouts and lights were wanted earlier, and any attempt to supply their deficiency at that moment cannot operate as a valid excuse for neglect to supply them in season, as required by the rules of navigation. Extended argument to show that the rules of navigation require that a vessel should have a lookout properly stationed on the vessel is unnecessary, as the views of this court have been too fully and too often expressed upon the subject to require their repetition to enforce the proposition. Sailing-ships as well as steamers navigating in the thoroughfares of commerce must have a constant and vigilant lookout stationed in a proper place on the vessel, and charged with the duty for which a lookout is required, and he must be actually employed in the duty to which he was assigned. Lookouts stationed in positions where the view is obstructed either by the lights, rigging, or spars of the vessel, do not constitute a compliance with the rules of navigation, as seamen when they are so situated are as incompetent to perform that duty as if they were physically incapable of seeing an approaching vessel. *Chamberlain et al. v. Ward et al.*, 21 How. 570. Perhaps one lookout is sufficient for small vessels, but they should never be without some one to perform that important duty. *The Keystone State*, 22 How. 471; *Whitridge v. Hill*, 23 How. 448; *The Morning Light*, 2 Wall. 550; *The John Adams*, 1 Cliff. 410.

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Strong doubts are also entertained whether the schooner can be held to be excused for the condition in which her lights were at the time of the accident, but it is not deemed necessary to enter very fully into the consideration of that subject, as it is clear that she was in fault in not having a competent lookout properly stationed on the vessel. Her lights certainly did not comply with the fifth article of the sailing rules, and the evidence does not bring the case satisfactorily within the exceptional regulations established by the sixth article, 13 Stat. at Large, 59.

Decree affirmed with costs.

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SAMUEL DUTTON, Libellant and Appellant, v. STEAM-TUG EXPRESS, HOLT *et als.*, Claimants, Appellants.

Masters of vessels being selected by the owners, the latter are responsible for the qualifications of the former. Masters are required to possess and exercise reasonable skill and judgment in the discharge of duty.

Where a tow is lashed to the side of a steam-tug, and depends wholly upon it for motive power and steerage, the responsibility for the navigation of both is wholly on the tug.

Where a vessel is drawn by a hawser extending from her forward part to the stern of the tug, both vessels have duties to perform, and it may then happen that either or both of the vessels may be in fault in case of accident.

Where tow-lines are used the master of the tow is bound to obey all proper orders of the master of the steamer.

If the master of the tow refuses or neglects such reasonable obedience, or fails in reasonable skill, or attention to his duty, the owners of the tug are not to be held responsible for the consequences.

In this case the owners of the tug were held responsible for an accident to the tow, because the master did not pursue the channel in a river which he was requested and had tacitly consented to take, and because he had given, on entering the channel, confused and contradictory orders, which, it was held, led to the accident.

ADMIRALTY appeal in a cause of damage caused by the fault of the Express, by which the schooner of the libellants was run aground and injured. The place of injury was Union River, near Ellsworth, Maine. Damages were claimed by the libellant, as the owner of the schooner A. Hooper, against the steam-tug Express, for the breach of an alleged contract, made by the master of the steam-tug, to tow the schooner from the wharf where

the schooner was lying, at Ellsworth in this district, down the Union River on her voyage to Boston, to the usual place of casting off vessels in tow, at the mouth of the river. Pursuant to that contract, as the libellant alleged, the steam-tug, on the 19th of July, 1869, made fast to, and took control of, the schooner; and the charge in the libel was that the master and crew of the steam-tug, in towing the schooner down the river on her voyage, were guilty of negligence and carelessness, and such want of skill and judgment that the steam-tug ran the schooner aground and injured her to the amount of \$600. Four defences were set up in the answer, which in substance and effect were as follows:—

1. That the master of the steam-tug did not make any such contract as that set forth in the libel; that he did not make any contract upon the subject, except what was implied from the fact that he made fast to the schooner, for the purpose of towing her down the river, in pursuance of his ordinary business of towing vessels; that he did not contract to tow the schooner by the eastern channel, as alleged in the libel, but that he was at liberty to tow her down the river by any channel which he as master of the steam-tug judged safe and convenient.

2. That the schooner grounded at the entrance to the western channel, and that she received the injuries described in the libel through the carelessness and negligence of her master and crew, and by the failure on their parts to comply promptly with the orders and directions of the master of the steam-tug.

3. That the injury to the schooner was not occasioned by her grounding, but by the vessel keeling over toward the channel, as the tide receded, on a rock; that the injury might have been prevented if the master had removed, or even shifted, his deck load, or if he had taken any proper precaution in the emergency.

4. That the master of the schooner at the time the master of the steam-tug undertook to tow the schooner down the river misled the master of the steam-tug as to the draught of the schooner when loaded; that she drew more water than he represented at that time; and that she would not have grounded if his representations had been true.

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Testimony was taken on both sides, and the District Court overruled the several defences set up in the answer, and entered a decree for the libellant in the sum of \$ 350 damages and costs of suit, whereupon the claimants of the steam-tug appealed to this court. All of the evidence in the District Court was sent up in the transcript of the record, and the parties have entered into written stipulation that it is correctly reported. Since the appeal additional testimony was taken, and the parties were fully heard upon all the questions involved in the pleadings. The questions were almost entirely of fact.

*A. A. Strout and G. P. Dutton*, for libellant.

*Geo. F. Talbot and Hale*, and *Emery*, for claimants.

CLIFFORD, J. Masters of vessels are selected and appointed by the owners, and the owners are responsible that the master is qualified for the situation. Vested as the owners are with the power of appointment, they are under obligations to employ persons possessing reasonable skill and judgment in the performance of their duties, but they do not contract that they shall possess such qualities in an extraordinary degree, nor are they insurers that the masters, in any given emergency, shall do what after the event others may think would have been best, if it appear that they exercised reasonable skill and judgment in view of the impending peril. *The Niagara*, 21 How. 22; *The Star of Hope*, 9 Wall. 230.

Compensation for the damage occasioned to the schooner by her grounding at the entrance of the western channel of the river is claimed by the libellant upon the ground that the master of the steam-tug contracted to tow the schooner down the river by the eastern channel, and that he committed a breach of the contract in attempting to enter the western channel, and that he was guilty of negligence and carelessness in the performance of his duties as master of the steam-tug. Suppose the disaster was occasioned by the negligence or carelessness of the master of the steam-tug, or by his want of due skill and judgment in the performance of his duties, it is quite clear that the owners of the steam-tug would be responsible to the libellant for the injuries received by the schooner, even if no such contract was made as

that alleged in the libel, but the inquiry whether or not such a contract was made becomes a matter of much importance in determining the question whether there was any such negligence and carelessness or want of due skill and judgment as is supposed in the charge made by the libellant. He alleges in the libel that the master of the schooner directed the master of the steam-tug to take the eastern channel of the river, and not the western, in towing the schooner down the river, and that the master of the steam-tug signified his assent to that direction. Direct testimony to that effect is given by the master of the schooner, and the record shows that he is confirmed by other witnesses.

On the day alleged in the libel, the schooner, before she was taken in tow by the steam-tug, was lying at Hall's lower wharf, loaded with two thousand two hundred cedar sleepers for railroads, and with eight thousand feet of spruce planks, — eight or nine hundred of the sleepers being stowed on the deck of the vessel. Her deck load was seven and a half feet high, or five feet above the rail. Inquiry was made of the master of the schooner, by the master of the steam-tug, early in the morning, before high tide, whether the schooner would be ready to go down the river during that tide, and the testimony shows that the master of the schooner answered the inquiry in the affirmative, and that the master of the steam-tug stated in reply, that he had an engagement to tow two vessels down the river to Tinker's wharf, and that he would return when that service was performed, and take the schooner in charge. About eight o'clock, just before high tide, the steam-tug returned from the performance of that service, and it appeared that she came up the eastern channel, passed the steam-boat wharf, and came alongside the schooner, where she was lying heading down the river. Some conversation took place between the master of the steam-tug and the master of the schooner, at that time each standing on the forward part of his vessel, as they were lying starboard and starboard, their bows only lapping. Undoubtedly the master of the steam-tug came alongside to take the schooner in tow, in pursuance of the previous conversation, and the testimony of the master

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of the schooner is, that he asked him if the schooner was ready to start, and that he told him that she was, excepting that his cook was ashore, and that he would come on board immediately. Responsive to that, the master of the steam-tug said it was getting near high water, and that it was about time to go; to which the master of the schooner replied, that he need not wait for the cook; that he might at once make fast to the schooner; and he also testified that he told the master of the steam-tug that he wanted him to tow the schooner by the eastern channel; that the master of the steam-tug asked him how much water the schooner drew; that he told him that she drew eight and a half feet strong; and that the master of the steam-tug stated that he could take the schooner out by the western channel if she did not draw more water than her master represented. Then follows the important conversation which, if true, proves the contract substantially as alleged in the libel. Evidently the sentence last reported was intended as a proposition to tow the schooner through the western channel; but the master of the schooner testifies that he immediately replied that he dared not attempt the western channel, as that channel was obstructed, and his deck load was so high he was afraid of getting upset; that if he would take the schooner down the eastern channel, he, the master of the schooner, was ready to proceed; but if not, to let the schooner remain where she was, as he would not attempt to go by the western channel, and he also testifies that the master of the steam-tug said, "Pass your lines then," "Give us your lines," and that he gave them the lines, supposing they were to go by the eastern channel. Express confirmation of the statements of the master of the schooner in respect to the alleged contract is found in the testimony of several witnesses, examined by the libellant, especially in that of the pilot of the steam-tug, and that of two seamen stationed on the forward part of the schooner at the time the arrangement was made between the masters of the respective vessels. Attempt is made to impeach the credit of the pilot as a witness, by showing that his general reputation for truth and veracity is bad, and several witnesses were examined by the respondents, who have testified to that effect.

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Witnesses were also examined upon that subject by the libellant, who testify that they have never heard his reputation in that behalf questioned; but it is not necessary for the court to enter much into that inquiry, as the statements of the master of the schooner in respect to the alleged contract are satisfactorily confirmed, even if that of the pilot is not entitled to belief. Support to the substance of his testimony is also derived from the testimony of the master of the steam-tug, who was examined by the respondents. His attention was directly called to the subject of the alleged contract, and he fails to contradict the most important portion of the testimony of the master of the schooner. He denies explicitly that there was anything said on his part about the eastern channel, but he does not deny that the master of the schooner told him that the western channel was obstructed, that he did not dare attempt to go out by that channel, that his deck load was so high that he was afraid of getting up-t, nor does he deny that the master of the schooner told him to let his schooner remain where she was lying unless he would take her down the eastern channel. Silent acquiescence on the part of the master of the steam-tug in the final terms proposed by the master of the schooner was as effectual to close the contract as an express assent would have been, as he must have known that the lines of the schooner were passed to him with the distinct understanding on the part of her master that he was to take the eastern channel of the river in performing the towage service. Confirmation of the theory of the libellant, that the masters of both vessels understood, when the trip was commenced, that the schooner was to be towed down the river through the western channel, is also derived from the course pursued in leaving the wharf where the schooner lay, and from that moment until the master of the steam-tug gave the order to the schooner to port her helm, just before the disaster occurred. Considerable conflict exists in the testimony, but when considered as a whole it is persuasive and convincing that the distinct understanding between the masters of the schooner and steam-tug was that the schooner was to be towed down the eastern channel. Different modes of towing are adopted by different tow-boats, or

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even by the same tow-boat on different occasions. Where the tow is lashed to the side of the steam-tug and depends entirely upon the latter as well for steerage as for motive power, the responsibility for the navigation of both is wholly on the steam-tug, as the tow is as completely under the control of the steam-tug as if she was a part of that vessel. *The Johnson*, 9 Wall. 151. Cases arise, however, where the tow is propelled by a hawser extending from the forward part of the tow to the stern of the steam-tug, and in such cases both vessels have duties to perform, and it may happen that the steam-tug or tow, or both, may be in fault, according to the circumstances. *Sturgis et al. v. Boyer et al.*, 24 How. 121; *The James Gray*, 21 How. 192.

Tow-lines were used in the case before the court, and it appears that they were fastened to the windlass bitts of the schooner, and to the tow-post constructed for the purpose near the stern of the steam-tug, and that the two vessels were fifty feet apart, as they proceeded down the river. Masters of vessels in tow in such cases are bound to obey all the proper orders of the master of the steam-tug, as the chief responsibility for the navigation of both vessels rests upon that officer, and if the master of the tow refuses such obedience, or is guilty of negligence and carelessness, or want of due skill and judgment in the performance of his duties, the owners of the steam-tug are not liable for the consequences to the owners of the tow. Somewhat different rules apply in cases where the rights of third persons are involved, but where the controversy is between the owners of the steam-tug and the owners of the tow, it is clear that the owners of the former are not liable if the disaster was occasioned by the fault or misconduct of those in charge of the other vessel.

Suppose such a contract was made as that alleged in the libel, still the respondents contend that they are not responsible to the owners of the schooner in the case before the court, because they insist that the disaster was occasioned by the carelessness and negligence of the master of the schooner, and by his refusal or neglect to obey promptly the order of the master of the steam-tug. Prior to the circumstance in question, the testimony clearly shows that the course pursued was the proper one for the vessels

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of the kind intending to take the eastern channel, but the weight of the evidence shows that a change became necessary in order to enter the western channel, and the theory of the respondents is, that the master of the steam-tug, in order to effect that change, gave the order to port the helm, and that the master of the schooner, instead of obeying that order first, hove the wheel to starboard, turning the schooner a point or so in the wrong direction, before he attempted to execute the proper order, and they insist that it was that mistake, in connection with the delay which ensued in putting the helm to port, which caused the disaster in attempting to enter the western channel. Instead of that, the theory of the libellant is, that the mistake which caused the disaster was made by the master of the steam-tug; that he first gave the order to starboard before he gave the order to port, and that the master of the schooner immediately obeyed that order, and that he also attempted to obey the other as soon as it was given, but that it was impossible, as the helm dragged in the obstructions which had accumulated in that part of the channel.

Mills of various kinds, for the manufacture of lumber, are situated above on the river, and the navigation at several points, as more fully explained in the testimony, is much obstructed by slabs, sawdust, and edgings, which have floated down the river and rest in large masses upon the bottom. Numerous witnesses were examined on the one side and on the other in support of these conflicting theories, in whose testimony was given every circumstance which either party could invoke in support of his particular theory, including the description of the condition of the channel, the course of the two vessels, and everything which was said or done on board either vessel before the disaster. Beyond all question the master of the schooner did have his helm to starboard before he put the helm to port, and it is equally clear that the proper order to be given on the occasion, if the intention was to enter the western channel, was to port the helm, as it was necessary that the schooner should turn to the right for that purpose. Throughout the trip her course had been the proper one, to pass down the eastern channel to the place of destination, as arranged between the masters of the respective vessels, and the

circumstances considered together leave no doubt in the mind of the court that the master of the schooner, and every one on board that vessel, understood that in continuing the trip they were to pass through that channel to the place of destination, as arranged between the masters of the respective vessels before they started.

Whether the master of the steam-tug actually gave the order to starboard before he gave the order to port is left in doubt by the evidence. Perhaps the better opinion is that he did not, but whether he did or not, it is proved to the entire satisfaction of the court that the responsibility of the mistake, whether it was made by the master of the steam-tug, as is supposed by the libellant, or by the master of the schooner, as is supposed by the respondents, properly belongs to the master of the steam-tug, as he caused it to be made by the other vessel or by her master. Viewed in any light consistent with the evidence, he was responsible for the consequences, as it is shown to the entire satisfaction of the court that he either caused the disaster by giving a wrong order, or, what is more probable, he was the procuring cause of the same, by misleading the master of the schooner and suffering him to continue to suppose that they were going by the eastern channel, when in point of fact he, as master for the time being of both vessels, had determined to go by the other. Concede, for the sake of the argument, that the power to direct the course of the trip was vested in the master of the steam-tug, still the conclusion cannot benefit the appellants, as it is clear that, having agreed to go by the eastern channel, he could not properly attempt to go by the other without giving reasonable notice to the master of the other vessel of such intention, as he must have known that the agreement would necessarily tend to mislead the other party in the performance of his duty as master of the schooner which he had in tow. Intentional disobedience of orders is not imputed to the master of the schooner, and, if it were, the imputation could not be sustained for a moment, as there is not a fact or circumstance in the case to support such a theory. Evidence, as before remarked, is not wanting to show that the master of the schooner was directed to



starboard before he was directed to port, but the better opinion is that he did not correctly understand the order, and, knowing what the contract was, assumed that it was an order to starboard, which would have been the proper order if the intention had been to go by the eastern channel. Caused as the mistake was, either by the omission of the master of the steam-tug to give reasonable notice to the master of the schooner that he had determined not to fulfil his contract and go by the eastern channel, or by his own improper order to starboard, the court is of the opinion that the defence that the disaster was occasioned by the negligence, carelessness, or want of skill and knowledge of the master of the schooner is not sustained.

Argument to show that some portion of the injuries received by the schooner were occasioned by the grounding of the vessel is unnecessary, as the evidence to support the proposition is too full to require any comments to enforce it; but the respondents insist that certain other portions of the injuries might have been prevented if the master had removed his deck load, or even shifted it from one side of the vessel to the other, or if he had taken any proper precaution in the emergency. Injuries occasioned by the grounding of the vessel, it is conceded, constitute a proper charge to the claimants if the disaster was in fact occasioned by the fault of the master of the steam-tug, but it is insisted that the additional injuries occasioned by the heeling over of the schooner do not fall within the same category. Defences of the kind just mentioned are more particularly for the consideration of the master, as they do not constitute an answer to the entire cause of action set up in the libel; but the court has looked into the record, and is of the opinion that the charge of negligence made against the master of the schooner is not sustained by the proofs. Much greater reason exists to conclude that the master of the steam-tug was guilty of fault, in prematurely abandoning the schooner which he had in tow, than to suppose that the master of the schooner was guilty of any culpable omission to save the vessel from further injury.

Complaint is also made that the master of the schooner at the time the contract was made was guilty of misrepresentation

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as to the draught of the schooner when loaded ; but the charge is wholly unsupported by proof, and is therefore dismissed without further remarks. Error in the amount awarded is not alleged in argument, nor is it necessary to re-examine that question, as the parties waived the usual reference to a master, and the clear inference from the record is, that both parties acquiesced in the finding of the court as to amount.

Decree affirmed with costs.

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JOHN Q. SCAMMON, Assignee in Equity, *v.* THOMAS H. COLE *et al.*,  
Appellants.

The United States Bankrupt Act now in force, confers jurisdiction in Equity upon the District Courts in certain cases, and appeals may be taken from the District to the Circuit Courts in all such cases where the debt or damage claimed amounts to more than five hundred dollars, provided the appellant complies with the conditions specified in § 8 of the act.

A mortgage given to secure the payment of two promissory notes, the consideration of which being pre-existing debts of the bankrupt, for almost all of which the mortgagees were liable either as sureties or indorsers, is void when it appears that it was made within four months next preceeding the filing of the petition in bankruptcy, for the express purpose of giving a preference ; that the mortgagors were insolvent and the mortgagees had reasonable cause to believe that the mortgagors were insolvent at the time of the execution of the mortgage, and that the conveyance was made in fraud of the provisions of said act.

BILL in Equity praying that the respondents might show cause why certain property and the proceeds thereof should not be adjudged to have been the property of certain bankrupts, Chadbourne and Nowell, at the time a petition in bankruptcy was filed against them in the District Court.

On July 11, 1868, a creditor of the firm of Chadbourne and Nowell of Biddeford, in this district, filed in the office of the clerk of the District Court a petition in bankruptcy against the firm, and on December 2 following they were adjudged bankrupts. Pursuant to the decree the appellee was appointed assignee of the estate of the bankrupts, and a conveyance of all their property was made to him as such assignee by the register in

bankruptcy having charge of the case. It was alleged that the debtor on June 17 of the same year, and within four months before the filing of the said petition, being insolvent or in contemplation of insolvency, made a conveyance to the appellants of the personal property described in the bill of complaint, with a view to give to the grantees a preference as creditors of their firm, they, the said appellants, having reasonable cause to believe that the grantors were insolvent, and that such conveyance was made in fraud of the provisions of the Bankrupt Act. Possession by the appellants of the property conveyed, and demand of the same by the assignee, and their refusal to deliver the same, were also alleged by the complainant, and he prayed that the respondents might be summoned to appear and answer the complaint, and show cause, if any they had, why the property or the proceeds thereof should not be adjudged the property of the bankrupts at the time the said petition was filed, and that the same should be delivered to the complainant as such assignee. Service was duly made, and the respondents appeared and filed separate answers. They severally admitted that the bankrupts at the time alleged made a mortgage to them of the goods and chattels specified in the bill of complaint, but they alleged that it was given for a present consideration, and explicitly denied that the mortgagors, at the time the instrument was executed, had any knowledge that they or either of them were insolvent, and they also denied that the debtors gave the mortgage, or that they, the respondents, took the same with any view to give or to secure to them any preference as creditors of the bankrupts, or to prevent their property from being duly distributed under the Bankrupt Act. Proofs were taken in the District Court, and the cause was heard, and a decree entered that the conveyance made by the bankrupts to the appellants was illegal, fraudulent, and void, and that the cause be referred to a master to take an account of the property received by the respondents. Due report was made by the master, specifying the property received by the respondents under the mortgage, and the net proceeds of such portion of the same as they had sold and appropriated to their own use. Such of the property as remained in their possession they were re

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quired, by the final decree of the District Court, to deliver to the complainant, and that he should also recover of them, for such portion of the property as they had sold, the sum of \$956.12, together with costs of suit.

Appeal was duly taken by the respondents to this court, and the parties were fully heard upon the merits of the controversy. Certain exceptions were taken to the master's report, but were not pressed at the argument, and need not therefore be noticed.

*J. and E. M. Rand*, for complainant.

*A. A. Strout*, for appellants.

[After a review of the facts of the case, and certain references to the pleadings, both of which are to be found in the statement, the court proceeded to say:—]

CLIFFORD, J. Jurisdiction is conferred upon the District Courts in certain cases, by the act of Congress establishing a uniform system of bankruptcy, and § 8 of the act provides that appeals may be taken from the District to the Circuit Courts in all such cases when the debt or damages claimed amount to more than \$500, provided the appeal is claimed within ten days after the entry of the decree, and the appellant complies with the other conditions specified in that section.

Preferences, as well as fraudulent conveyances, if made within four months before the filing of the petition by or against the bankrupt, are, under certain conditions, declared void by § 35 of the Bankrupt Act; those conditions, so far as they are applicable to this case, are as follows: "That if any person, being insolvent or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, who is under any liability for him, . . . makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, . . . having reasonable cause to believe such person is insolvent, and that such . . . payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee

may recover the property, or the value of it, from the person so receiving it, or so to be benefited."

Three things must appear in order that the transaction may fall within that provision and be affected by it, as alleged in the bill of complaint.

1. That the payment, pledge, assignment, transfer, or conveyance was made within four months before the filing of the petition by or against the bankrupt, and with a view to give a preference to some one of his creditors, or to a person having a claim against him, or who was under some liability on his account.

2. That the person making the payment, pledge, assignment, transfer, or conveyance was insolvent or in contemplation of insolvency at the time the preference was given or secured.

3. That the person receiving such payment, pledge, assignment, or conveyance, or to be benefited thereby, had reasonable cause to believe that the person making the same and giving or securing such preference, was insolvent, and that the payment, pledge, assignment, transfer, or conveyance was made in fraud of the provisions of the Bankrupt Act.

All these matters are fully alleged in the bill of complaint, but they are distinctly denied in the answers, so that the complainant takes the burden of proof in the first instance. Much discussion of the first requirement to maintain the bill of complaint is unnecessary, as the record shows that the mortgage in question was made to give a preference to the mortgagees, and was executed by the bankrupts only twenty-five days before the petition in bankruptcy was filed in the District Court. By the terms of the mortgage it appears that it was given to secure two promissory notes, signed by the mortgagors, of even date with the mortgage, one given to the first-named appellant for the sum of \$1,272.50, and the other to the other appellant for the sum of \$1,547.61, both payable on demand with interest. Both notes were given for pre-existing debts of the bankrupts, for all of which the appellants were liable, either as sureties or indorsers, except a small sum due to one of the mortgagees.

Prior to the decree in bankruptcy, the mortgagors were en-

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gaged in buying and selling furniture, and the proofs show that they were largely indebted, and that the mortgage covered all their personal property, except one horse, not subject to attachment by the laws of the State; and that the senior partner of the firm, as a part of the same transaction, mortgaged to the appellants all his real estate, to secure the payment of the same two notes. Neither the firm nor the other partner appears to have owned any real estate, so that the two mortgages covered all of their attachable property, whether belonging to the firm or to them as individuals.

Fraudulent preference is the *gravamen* of the charge, and the complainant, as the assignee of the estate of the bankrupts, prays that the respondents may be required to answer the complaint, that the mortgage of the personal property may be set aside, and that the property therein described may be adjudged the property of the bankrupts at the time the petition was filed.

Made as the mortgage was, within four months next preceding the filing of the petition in bankruptcy, and for the express purpose of giving a preference to the appellants as the creditors of the mortgagors, the first material allegation of the bill of complaint is established.

Were the mortgagors insolvent or in contemplation of insolvency at the time the mortgage was executed? is the next material inquiry arising in the case as presented in the pleadings. Beyond doubt they owed debts greatly exceeding the value of all their property, and they mortgaged it all to the appellants to secure less than one third part of their indebtedness. Liberally estimated, their whole property did not exceed in value the sum of \$6,700, and they had mortgaged it all, including their stock in trade, to secure the two notes described in the mortgage deed, giving the mortgagees of the personal property the right to enter and take possession of the same at any time whenever they should see fit. They owed not less than \$11,000, as appears by the record, and it is not pretended that any portion of the same, other than what was adjusted between the parties to the mortgage and was included in those two notes, is secured in any manner. All sums due to the appellants, or for

which they were liable as sureties or otherwise, on account of the mortgagors, were included in the mortgage, but no provision was made for the other creditors or for any portion of their indebtedness, except what is included in the mortgage; whether the mortgagors knew it or not, it is clear to a demonstration that they were actually insolvent at that time, and it would be difficult, if not impossible, in view of the proofs, to hold that they were ignorant of the fact, as they had several times been obliged to procure renewals and extensions, and some of their paper was still overdue, and the testimony of the first-named appellant shows that the senior member of the firm told him when the mortgage was given, or the day before, that they had notes in the bank which were overdue and others coming due which they desired to arrange, adding that the notes "bothered" them, as it took much time to attend to them when they ought to be at work. Viewed in the light of the proofs in the case, as more fully set forth in the record, it is so clearly shown that the mortgagors were insolvent at the time the mortgage was executed, that it does not seem necessary to pursue the inquiry.

Two inquiries of fact are involved in the third condition specified in the clause of the section under consideration: Whether the mortgagees had reasonable cause to believe that the mortgagors were insolvent at the time they executed the mortgage to the appellants. Whether they had reasonable cause, at that time, to believe that the mortgage was made in fraud of the provisions of the Bankrupt Act. Separate answers were filed by the respondents, and they respectively denied that at the time of the making of the mortgage they believed, or had any reasonable cause to believe, that the mortgagors were insolvent or "in contemplation of insolvency," as alleged in the bill of complaint.

Proof that the respondents had actual knowledge that the mortgagors were insolvent at that time is not required in order to maintain the bill of complaint, but the allegation in that behalf is sustained if it appears that the mortgagees had reasonable cause for such belief, as that is the language of the thirty-fifth section of the Bankrupt Act. Actual knowledge is not made the criterion of proof in this matter, nor is it necessary that



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it should appear that the respondents actually believed that the mortgagors were insolvent; but the true inquiry is, whether the appellants, as business men, acting with ordinary prudence, sagacity, and discretion, had reasonable cause to believe that the debtors were insolvent in view of all the facts and circumstances known to them at the time they received the transfer of the property. *Coburn v. Proctor et al.*, 15 Gray, 38.

Such a party cannot be said to have reasonable cause to believe that his grantor or mortgagor is insolvent unless such was the fact, but if it appears that the party making the conveyance was actually insolvent, and that the means of knowledge upon the subject were at hand, and that such facts and circumstances were known to the party receiving the conveyance as clearly put the assignee, transferee, or grantee of the property upon inquiry, it would seem to be just to hold that the party receiving the assignment, transfer, or conveyance, even if he omitted to make inquiries, had reasonable cause to believe that his assignor or grantor was insolvent. Ordinary prudence is required of the purchaser in respect to the title of the seller, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge it is reasonable to suppose he would have acquired if he had performed his duty. *Hill v. Simpson*, 7 Ves. Jr. 170; *Kennedy v. Green*, 3 Myl. & Keen, 722; *Smith v. Low*, 1 Atk. 489; 3 Sug. on V. and P. 471; *Jones v. Smith*, 1 Hare, 43; *Pringle v. Phillips*, 5 Sand. S. C. 157; *Booth v. Barnum*, 9 Conn. 286; *Pitney v. Leonard*, 1 Paige, Ch. 461; *Carr v. Hilton*, 1 Curt. C. C. 390.

Constructive notice of the kind mentioned is held sufficient in many cases, upon the ground that when a party is about to perform an act by which he has reason to believe that the rights of a third person may be affected, an inquiry as to the facts is a moral duty, and diligence an act of justice. Whatever fairly puts a party upon inquiry is sufficient notice in equity where the means of knowledge are at hand, and if the party under such circumstances omits to inquire, and proceeds to receive the transfer or conveyance, he does so at his peril, as he is then chargeable with a knowledge of all the facts which, by a proper inquiry, he might have ascertained. *Hawley v. Cramer*, 4 Cow. 717; *Williamson v. Brown*, 20 Law Rep. 397.

Apply that rule to the proofs in the record, and it is too clear for argument that the finding of the District Court under this issue was correct, as fully appears from the evidence to which reference has already been made in examining the preceding proposition. Sufficient information might easily have been obtained, as a large amount of the paper of the bankrupts was in the bank where one of the appellants was a director. Suppose, however, that the rule of constructive notice is not applicable in the case, still it is quite obvious that the same conclusion must be reached, even if the proper rule of decision is the one ordinarily applicable in equity suits. Where the facts charged in the bill as the grounds of obtaining relief are clearly and positively denied in the answer, and are only supported by one witness, the rule is well settled in equity as administered in the Federal courts, that the court will not decree in favor of the complainant. *Union Bank v. Geary*, 5 Pet. 111; *Delano v. Winsor et al.*, 1 Cliff. 505; *Parker et al. v. Phetteplace*, 2 Cliff. 79.

Such an answer is evidence in favor of the respondent, and unless it is disproved by something more than the testimony of one witness, it is conclusive. *Clark's Executors v. Van Riemdyk*, 9 Cran. 160; *Hughes v. Blake*, 6 Wheat. 468; *Daniel v. Mitchell et al.*, 1 Story, 188.

Congress, however, may prescribe a different rule in such litigations, and Congress has provided to the effect that if all the other conditions specified in the section concur, and it appears that the person who received the pledge, assignment, transfer, or conveyance had reasonable cause to believe that the person from whom he received it was insolvent, that the assignee of the bankrupt's estate, under those circumstances, may recover back the property or its value, as already more fully explained. 14 Stat. at Large, 534.

Different causes of action will doubtless require different forms of remedy, but the section under consideration contains no intimation that the rule of evidence is any more stringent in a suit in equity than in an action at law, but the language of the section applicable in all cases is to the effect that it must appear that the party making the pledge, assignment, transfer, or convey-

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ance was insolvent at the time the same was made, and that the party receiving it had reasonable cause to believe that such was the fact. Actual knowledge of a given fact may be proved by circumstances, even in an ordinary equity suit, where, from the nature of the pleadings, the testimony of a single witness, without corroboration, would not be sufficient, and it is equally clear that circumstances may be sufficient to show that the transferee, mortgagee, or grantee of the property of an insolvent person had reasonable cause to believe that he was insolvent at the time the transfer, mortgage, or conveyance was made. Willing ignorance, as where a party wilfully shuts his eyes to the means of information which he knows are at hand, is regarded in many cases as equivalent to actual knowledge, and it is difficult to see why that rule should not be applied in the case before the court. *May v. Chapman*, 16 Mees. & Wels. 355; *Goodman v. Simonds*, 20 How. 343; *The Lulu*, 10 Wall. 202.

Concede, however, that by the true construction of the provision, the rule of constructive notice does not apply in such a case; that such an assignee, transferee, mortgagee, or grantee is not obliged to make any investigation; that the only proper inquiry in the case is whether the party receiving the transfer, mortgage, or conveyance, in view of the attending circumstances and of all the facts known to him concerning the business and pecuniary condition of the party making the transfer, mortgage, or conveyance, had reasonable cause to believe that the other party to the instrument of transfer, mortgage, or conveyance was insolvent at the time the same was made, still the same conclusion must follow, as it appears to the entire satisfaction of the Circuit Court that the appellants, as reasonable men, acting with ordinary prudence, sagacity, and discretion, "had good ground to believe" that the debtors were insolvent when they received the mortgage. Support to that conclusion is found in the testimony of the appellants as well as in that of the first-named mortgagor, and it is confirmed to the entire satisfaction of the court by the circumstances attending the execution of the mortgage.

Extended comments upon the evidence are unnecessary in this court, as the question was very fully examined in the opinion of

the district judge, where all or nearly all of the material portions of the evidence are reproduced. Suffice it to say, the entire available means of the mortgagors did not exceed \$6,700, and their debts, including the two notes secured by the mortgages, did not fall short of \$11,000, showing beyond all doubt that they were deeply insolvent. Their paper, on which the appellants were liable to the amount of \$1,250, was then overdue and unpaid, as is fully proved. Money which they had borrowed to a large amount was due to other parties, the payment of which might be demanded at any moment. Extensions had several times been granted to them, but the evidence shows that forbearance did not enable them to meet their liabilities, and it is doubtless true that these embarrassments prevented them at times from attending to their regular business. Recent extensions were obtained on liabilities where the appellants were not sureties, and the mortgagors owed other creditors whose demands were overdue and for which no provision was made.

Many of these facts were known to the appellants, or became known to them during the negotiations which preceded the transaction in question, and they also knew that all of their own claims and indebtedness were secured by the mortgage, and that the mortgagors had no other property to secure what they owed to their other creditors. Obviously, the effect of the transaction was to give ample security to the appellants and to withdraw from every other creditor of the mortgagors all means of securing their demands, except by attaching the mortgaged property. Evidence of intended preference is disclosed in every feature of the transaction, and the circumstances, taken as a whole, are persuasive and convincing that the appellants had reasonable cause to believe that the mortgagors were actually insolvent.

Inquiries were made by the appellants, how much money the mortgagors desired to raise and what debts they proposed to pay or to secure, and the whole purpose of the applicants in desiring to mortgage their property was pretty fully explained. They also inquired how much they owed in Boston, and were told that the amount did not exceed \$1500 or \$2000, but the necessity or propriety of securing any other creditors than the appellants

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was not even made the subject of conversation. Sustained as the charge is by all the circumstances in the case, the conclusion of the court is that the allegations of the answer are disproved, and that the appellants did have reasonable cause of belief, as is alleged in the bill of complaint.

Suppose that is so, still the complainant is not entitled to an affirmance of the decree unless it also appears that the mortgage was made in fraud of the provisions of the Bankrupt Act, which is the only other disputed fact to be examined in the case. Before entering into any examination of the proofs exhibited in the record, it becomes necessary to inquire and determine whether the rule of evidence prescribed in § 35 of the Bankrupt Act applies to cases arising under the first clause of the section, or whether its application is confined exclusively to those arising under the second, which is the six months' clause, declaring certain sales, assignments, transfers, or other conveyances void if made within that period.

Whenever any person, being insolvent or in contemplation of insolvency within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent or to be acting in contemplation of insolvency, and that such payment, sale, assignment, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under the Bankrupt Act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation or effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the provision is that "the assignee may recover the property or the value thereof, as assets of the bankrupt." Those two clauses are connected, the clause declaring certain sales, etc., void, if made within six months before the petition by or against the bankrupt was filed, following the clause forbidding preferences and ending with a period after the word "bankrupt." Then follows the provision to be construed which reads as follows: "And if such sale, as-

signment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud."

Argument to show that the transfer and conveyance in this case was not made in the usual and ordinary course of business of the debtors, is quite unnecessary, as the proofs show that they were retail dealers, and that they mortgaged all their property to the appellants, leaving more than two thirds of their indebtedness wholly unsecured, so that if that provision applies to the first clause of the section, the burden of proof is unquestionably shifted upon the respondents. Had the provision in question preceded the second clause, the argument that the second clause was unaffected by it would have been entitled to great weight, and if so, and it was intended to make it applicable to both, then it must follow the second or be repeated, which could hardly be expected, judging from the usual course of legislation. Connected together as the two clauses are in the same section, it seems reasonable to suppose that Congress intended that the special rule of evidence prescribed should apply to cases arising under both, especially as every word of the provision except the word "sale" is as applicable to the first clause of the section as to the second, and even that is not entirely inapplicable to the case before the court, as the mortgage contains a stipulation that the mortgagees may enter whenever they see fit and take possession of the mortgaged property for their better security.

Both of these clauses were borrowed substantially from the insolvent law of Massachusetts, the first corresponding with § 89 of that law, and the second clause corresponding with § 91 of the same law. Gen. Stat. Mass. 593-4.

Separated, as the two enactments were in that law, by an intervening section, the argument that the special rule as to the burden of proof which is prescribed in § 91 applied only in cases arising under that section, was much stronger than in the case before the court, as the two clauses of the enactment in the Bankrupt Act are connected together and form a part of the same section; but the Supreme Court of that State held, notwithstanding that the two enactments were separated by an intervening

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section, that the provision in question applied to cases arising under § 89 as well as to those arising under § 91, which contains that provision. *Nary v. Merrill et al.*, 8 Allen, 452; *Metcalf et al. v. Munson et al.*, 10 Allen, 491.

Apparently it was the fact that the two sections were separated by an intervening one which occasioned the "difficulty in construing" the provision, but no such embarrassment exists in the case before the court, as Congress has eliminated that difficulty by uniting the two enactments in one section, and by re-enacting both since the decisions of the Supreme Court of that State were published, without employing a word to indicate that the construction adopted by that court is not correct.

Assume that the special rule of evidence mentioned applies to cases arising under the first clause as well as to those arising under the second, then it follows that the circumstances attending the execution of the mortgage and the transfer of the property afford *prima facie* evidence that the transfer was made in fraud of the provisions of the Bankrupt Act. Attempt was made in argument to overcome that presumption, but it is sufficient to say that it was wholly unsuccessful.

Decree affirmed with costs.

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### FRANCIS VOSE et al. v. GIDEON MAYO.

Where a motion for new trial is founded on facts not within the knowledge of the presiding justice, and not appearing on his minutes, it must be verified by affidavit, unless compliance with that requirement is waived by the opposite party.

No affidavit of merits is required where the motion is properly addressed to the minutes of the presiding justice, as where the motion is to set aside a verdict for error of ruling in the admission or rejection of evidence, or for refusing to instruct the jury as requested or for misdirection, or because the verdict was against law or against the evidence or the weight of the evidence.

The theory in such cases is that all the matters of fact alleged are within the knowledge of the presiding justice, or may be verified by reference to his notes.

Where the motion is founded upon alleged newly discovered evidence, or on the charge of misconduct by the opposite party or the jury in respect to the trial, it presents a preliminary question whether the facts are such as to make it the duty of the court to order notice to the opposite party and to direct how the proofs shall be taken.



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In all such cases the motion must be in writing, and must, unless the requirement is waived, be supported by affidavit.

Affidavits of the witnesses to be examined cannot be considered a compliance with the twenty-second rule of the Circuit Court relating to motions for new trials based upon newly discovered evidence.

The purpose of the rule is that the allegation of newly discovered evidence may be verified by the oath of the party or his attorney.

Probable cause for the motion must be shown, unless waived, before the court can interfere and give notice to the other side or take any steps to prevent the prevailing party from applying for judgment on the verdict.

Where the motion is properly verified by the affidavit of the party, *ex parte* affidavits of the witnesses are enough to warrant an application for notice to the opposite party.

Such affidavits are not, without consent, admissible in the final hearing of the motion.

For that purpose testimony must be taken in open court in civil or criminal cases, by depositions as provided by the Acts of Congress, or by interrogatories and cross-interrogatories, or, by consent, the court will, in its discretion, appoint a commissioner to take the testimony and report it to the court.

In this both parties had acquiesced in the taking of affidavits of the witnesses to be examined, and the court therefore looked into the affidavits as if they had been admitted by consent.

The motion, however, was denied, first, because the evidence was not newly discovered within the legal meaning of the phrase; second, because that which was offered was within the reach of the party moving, at the former trial, and was merely cumulative.

Evidence offered, in order that the motion prevail, should afford a reasonable ground to conclude that it would be productive of a different result from the verdict once obtained.

### MOTION for new trial.

The facts appear in the opinion.

*N. Webb* and *J. D. and F. Fessenden*, for plaintiffs.

*A. A. Strout*, for defendant.

CLIFFORD, J. Power to set aside a verdict before judgment and grant a new trial is vested in the Circuit Courts "in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law," and the correct mode of applying to the court for the exercise of that power is by a motion for new trial, which, under the rules of the Circuit Court in this circuit, must be made in writing, and must, unless the time is enlarged by leave of the court, be filed within two days after the verdict. Such a motion must assign the reasons for the application, and when the motion is grounded on facts not within the knowledge of the presiding justice, and not appearing in his minutes, it must be verified by affidavit, unless the requirement is waived by the opposite party. No affidavit of merits, however, is required when the motion is properly ad-

dressed to the minutes of the presiding justice, as where the motion is to set aside the verdict for error of ruling in admitting or rejecting evidence, or for refusing to instruct the jury as requested, or for misdirection, or because the verdict is against law, or against the evidence or the weight of the evidence, as the theory of the motion in all such cases is, that all the matters of fact alleged in the motion are within the knowledge of the presiding justice, or that they may be verified by reference to his minutes taken at the trial. Where the motion is for new trial on account of newly discovered evidence, or where the motion is grounded on the charge that the opposite party or the jury were guilty of misconduct in respect to the trial, the rule is different, as the motion in such cases presents a preliminary question whether the facts and circumstances disclosed are such as to make it the duty of the court to order notice to the opposite party, and to direct the mode in which the proofs shall be taken, and in all such cases the motion must be in writing, and must, unless the requirement is waived, be supported by affidavit. *Johnson v. Root*, 2 Cliff. 109, 128; *Hilliard on New Trials*, 393, § 35; *Macy v. De Wolf*, 3 W. & M. 196.

Two motions for new trial are filed in this case, neither of which is supported by the affidavit of the party filing the motion. They were filed by the plaintiffs, and are as follows: 1. That a new trial be granted because, as they allege, the verdict of the jury is against law and against the evidence in the case. 2. That a new trial be granted because, as they allege, they have discovered new and material evidence since the trial, not previously known to them, and they annex to the motion certain affidavits showing the nature of the evidence, and make the affidavits a part of the motion. Founded, as the present suit is, on two judgments previously recovered by the plaintiffs against the defendant, it will become necessary to refer to the causes of action set forth in the prior suits between these parties, in order that the exact nature of the controversy may be fully understood. Evidence was introduced showing that the plaintiffs agreed to sell to the Penobscot Railroad Company thirteen hundred tons of railroad iron and eventually to deliver the same to the com-

pany at Bangor, upon the conditions specified in the written agreement between the parties. Payment in cash for the amount of the duties was to be made by the company when the iron arrived at the place of delivery, and the agreement was that the company should give to the plaintiffs their negotiable promissory notes for an amount equivalent to the value at the agreed price, with the addition of the extra cost of freight and insurance beyond the amount of such charges if the shipment was made to the port of New York, the notes to be given to the defendant and to be by him indorsed and to be made payable at a bank in New York City with interest as specified, in four months from the date of the arrival of the iron; and the further stipulation was that the title to the iron should remain in the plaintiffs with power to dispose of the same at public or private sale, in case the notes given for the purchase-money were not paid at maturity; that the company should also deposit with the plaintiffs as collateral security the first mortgage bonds of the company to double the amount of such notes, and also an irrevocable order upon the treasurer of the city of Bangor for an amount of the scrip of that city, to which the company was entitled, sufficient to cover the amount of the notes given for the railroad iron. On the same day, and as a part of the same agreement, John M. Wood, the contractor, the party interested, agreed with the plaintiffs for a specified commission, and other valuable considerations, "to indorse and become responsible to them" for the promissory notes given under that agreement. Pursuant to that agreement the notes were given by the company to the defendant, and were indorsed by him and the contractor as agreed, and it appears that the described bonds of the company to the amount of \$146,000 were deposited by the company with the plaintiffs as collateral security for the payment of the promissory notes. Subsequently the iron arrived, but, the company failing to pay the notes, the plaintiffs took possession of the iron under the power reserved in the agreement, and sold the same, and commenced separate suits against the company and the defendant as first endorser.

These suits were commenced in Penobscot County, and they also commenced two suits in Cumberland County against John

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M. Wood, the contractor, as second indorser on the same notes. Judgments were recovered against the company and the defendant, who was sued in two actions. Two judgments against the defendant were rendered in favor of the plaintiffs in the Supreme Judicial Court of the State at the January term of the court, 1859, holden at Bangor, within and for the county of Penobscot. Execution was issued in one for \$23,440 debt, and \$75.78 costs, and in the other for \$8,576 debt, and \$43.13 cost of suit, as appears by the executions introduced in evidence. Nothing was collected on the executions, and the present suit is an action of debt against the defendant founded upon those two judgments. Nine pleas were pleaded by the defendant, of which the first two were pleas of *nul tiel record*, which terminated in issues to the court. All that need be said upon that subject is that the issues under those pleas were found for the plaintiffs, and that the trial proceeded under the other issues in the pleadings. Much reference to the fourth, fifth, and sixth pleas is unnecessary, as they terminated in issues of fact, and the respective issues were found for the plaintiffs. Special attention must be given to the third, seventh, eighth, and ninth pleas, as the issues of fact in which they terminated were found for the defendant, and he is entitled to judgment on the verdict, unless the verdict should be set aside for some one of the causes assigned in the respective motions.

Payment of the judgments described in the declaration to the plaintiffs on the 1st of January, 1860, is alleged by the defendant in the third plea, which is denied by the plaintiffs in their replication. As inducement he sets up, in his seventh plea, the two suits commenced in Cumberland county against the contractor as second indorser on the notes, and alleges that they agreed with the defendant in those suits as an adjustment of all matters in dispute between the parties, that judgments should be rendered therein for \$25,000 as damages in the aggregate, to be apportioned in those suits at the discretion of the plaintiffs, and that at the April Term, 1860, of that court, they recovered judgment in one of those suits for the sum of \$23,440 and costs of suit, taxed at \$32.22, and that at the October term following they recovered judgment in the other suit for

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the balance, to wit, for the sum of \$1,560 damages, and costs of suit taxed at \$29.77, and he alleges that both of said judgments were subsequently fully satisfied and paid. Most of the facts set forth in the seventh plea are admitted in the replication, but the plaintiffs allege that a much larger sum was due to them than the \$25,000 for which the contractor as second indorser gave them judgment, and they deny that the sums recovered were agreed to be received in full satisfaction of their judgments against the defendant, or that the judgments which they recovered against the contractor as such second indorser were ever fully paid, as alleged in the plea. Satisfactory evidence was introduced that the plaintiffs, after the recovery of the judgments described in the declaration, and before the present action was commenced, sold and assigned to Dennistoun, Wood, & Co. the judgments in question and the notes on which the judgments were founded, and the defendant alleged in his eighth plea, that the assignees subsequently, to wit, on the 1st of January, 1864, settled and adjusted the same with the two indorsers on the notes, and received in full satisfaction of the judgments the sum of \$1,237.50, as more fully set forth in the eighth plea. In their replication the plaintiffs deny that they ever made the assignment as alleged, and they also deny that they did on the day named, or at any other time, settle and adjust the matter with the two indorsers, or that they ever received the sum specified in the plea or any sum in satisfaction of said judgments and notes. Full payment to the plaintiffs is also alleged in the ninth plea, and the replication filed by the plaintiffs is substantially the same as that filed to the third plea.

Plenary evidence was introduced that the plaintiffs on the 7th of April, 1859, agreed with John M. Wood, that, if the parties to those notes or any of them should pay to them within ninety days from that date the full sum of \$25,000, they the plaintiffs would receive the same in full satisfaction of all their claim, and that they would surrender to the party legally entitled thereto all bonds of the company held by them as collateral security, and that all claims and demands between the parties should be considered as settled and adjusted. Judgments in

their suits against the contractor and second indorser had not been recovered, but the defendant in those suits on the same day agreed in writing that a default might be entered in either or both of those suits, and that judgment might be taken in either or both for an amount not exceeding \$25,000 in the whole, together with legal costs, and the case shows that judgment for the plaintiffs for the sum of \$23,440 was subsequently entered in one of those cases in pursuance of that agreement. They had a right to enter judgment on that day, but the evidence shows that an extension was granted by consent, and at the October term, 1860, they entered judgment in the other case for the sum of \$1,560 and costs, making the full sum of \$25,000 without including costs. Executions were issued on both judgments, and the whole of the smaller judgment and all of the larger, except the sum of \$1,237 of costs and interest, were satisfied by levying the executions on the estate of the judgment debtor, who was the contractor and second indorser of the notes.

Just after the date of that agreement the plaintiffs became embarrassed, and made the assignment described in the eighth plea, including the original contract for the iron, the notes, all the judgments and the claim to the bonds given by the company as collateral security for the payment of the notes. Due notice of the assignment was served on the two indorsers of the notes and on the railroad company. By virtue of the assignment the persons named as assignees claimed to be the owners of the judgments recovered against the company, and the several judgments recovered against the indorsers of the notes. They also claimed to be the lawful holders and owners of the bonds deposited as collateral security, and on the 25th of October, 1861, they sold \$96,000 of the bonds for \$5,000, still holding \$50,000 of the same, the balance of the amount deposited as collateral security. Insolvency prevented the company from proceeding with the enterprise, and the franchise and estate of the company were transferred to a new company as assignees. Negotiations ensued between the new company and the indorsers of the notes on one side, and the holders of the balance of the bonds deposited as collateral on the other, for the surrender of the balance

remaining of the bonds. Those negotiations with the holders of those bonds were conducted by the other parties through their attorney, who was a witness in the case. His testimony and other evidence in the case showed that they refused to surrender the bonds until they were paid the sum of \$1,237.50, which they insisted was a lien upon the bonds. Wood was to pay \$25,000 on the 6th of July, 1859, but the executions were not levied on his real estate until the 3d of May of the next year, and they insisted that they had a lien for the intervening interest and costs, and the evidence showed that the attorney of the other parties paid that amount to the attorney of the party holding the bonds, and received the bonds for the benefit of the contractor and second indorser of the notes given by the original company. Discussion of the rulings or instructions of the court is not required, as the exceptions taken at the trial are waived, and no questions of the kind are raised in the printed arguments. Instructions on all the points involved in the case were given at the trial, and in the absence of any exceptions it must be assumed that they were correct.

Questions of fact in view of the circumstances are the only questions to be examined under the motion. Brief reference will be made to those which were deemed of most importance at the trial, and which have been most pressed in this hearing. They are as follows: 1. That neither the plaintiffs nor their assigns have received the full amount of these judgments, nor have they accepted a less sum in full discharge of the amount for which the judgments were rendered. Suffice it to say, there was testimony on both sides of those issues, and the court is quite satisfied with the verdict of the jury, which is all that need be said upon the subject. 2. That the \$25,000 which the plaintiffs agreed to accept was not paid within the time specified in the agreement, which is a correct statement of the fact; but the circumstances in evidence tended very strongly to show that the delay was waived, and that the payments as made were accepted as a fulfilment of the terms of the agreement, and the court properly submitted the point with the evidence to the jury. Evidently they accepted the real estate, secured by the levying of



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the executions, as payment under the agreement, and the testimony showed, if the witnesses were believed, that the balance was subsequently paid to the attorney of the holder of the bonds, and that the plaintiffs or their senior partner received the benefit of the payment. Viewed in that light, it is unnecessary to examine the third and fourth propositions submitted by the plaintiffs, as it is quite clear, from what has already been remarked, that they cannot be sustained. Grant the fact to be so, still the plaintiffs contend that the verdict ought to be set aside, because they insist that the attorney who received the balance of the \$25,000 had no authority to accept the amount, that he was the attorney of the assignees and not of the plaintiffs, and that neither he nor the assignees at that time had any legal or equitable interest in the judgments in question. Full proof was introduced that the sum of \$1,237.60 was paid to the attorney of the assignees while the bonds were in his possession, and he testified that the senior partner of the plaintiff's firm accepted the credit of the money. Whether he was the attorney also of the plaintiffs at the time the money was paid was left in doubt by the evidence, but there were facts and circumstances in the case tending strongly to prove the affirmative of the issue, and the point was properly one for the consideration of the jury. Certain legal questions were also discussed, but inasmuch as there were no exceptions, it is not deemed necessary to enter upon that topic.

New and material evidence, it is alleged, has been discovered since the trial, and the second motion is that the verdict may be set aside and a new trial granted on that account. Unaccompanied, as the motion is, by any affidavit of the party filing it, the practice of the court would hardly warrant the court in granting it without requiring the party to comply with the twenty-second rule of the Circuit Court, as the motion is obviously grounded on facts not within the knowledge of the presiding justice, and which cannot be verified by any reference to his minutes. Affidavits of the witnesses to be examined cannot be regarded as a compliance with that rule, as the purpose of the requirement is that the allegation that new evidence has been discovered since the trial may be verified by the oath of the

party or of his counsel. Probable cause for the motion must be shown, unless the requirement is waived by consent, before the court will interfere and give notice to the other side, or take any step to prevent the prevailing party from applying for judgment on the verdict. Where the motion is properly verified by the affidavit of the party, *ex parte* affidavits of the witnesses to be examined are quite sufficient to warrant an application for notice to the opposite party, but such affidavits, except by consent, are not admissible in the final hearing of the motion any more than the trial of an issue of fact to the jury. Testimony for that purpose may be taken in open court in civil or criminal cases, or by deposition in civil cases as provided in the acts of Congress, or by interrogatories and cross-interrogatories as in other adversary proceedings between party and party, or by consent of parties as the court in its discretion will, in a civil action, appoint a commissioner to take the testimony and report the same to the court.

Both parties, however, in the case before the court, have acquiesced in the course pursued by the plaintiffs, and the court, in view of the circumstances, has looked into the affidavits of the witnesses, as if the affidavits were admitted by consent, and has compared the statements of the affiants with the evidence given at the trial, and the court is of the opinion that the motion, assuming the proceedings to be regular, ought to be denied for several reasons: Because the evidence is not newly discovered, within the legal meaning of that phrase. Evidence of the kind, in order that it may afford a proper ground for a new trial, must be in fact new, and such as reasonable diligence on the part of the party offering it could not have secured at the former trial, and must appear to be material in its object, going to the merits of the case, and not merely cumulative and corroborative: collateral, and it must, in general, be such as ought to be decisive and afford reasonable ground to conclude that it would be productive of an opposite result. Hilliard on New Trials, 375; Graham on New Trials, 463. Nothing, says the latter commentator, but a clear case of injustice, occasioned by means beyond the control of the party, and the reasonable certainty of correcting it by those means since brought to light and placed within

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the reach of the applicant, will answer the purpose. Comment upon the affidavits to show that the case made does not fall within any reasonable application of that rule is unnecessary, as the proposition is too plain for argument. *Howard v. Grover*, 28 Me. 97; *Handly v. Call*, 30 Me. 9; *Snowman v. Wardwell*, 32 Me. 275. Apart from that rule, however, it is obvious that the evidence offered was within the reach of the party at the former trial, and is merely cumulative. *Alsop v. Ins. Co.*, 1 Sum. 451; *Carr v. Gale*, 1 Cur. C. C. 384; *Gardner v. Gardner*, 2 Gray, 434; *McLaughlin v. Doane*, 56 Me. 289; *Atkinson v. Conner*, 56 Me. 546. The correct practice in such cases is of great importance, as the same rule, except as to the mode of taking the testimony, applies in criminal as well as in civil cases, where the defendant is found guilty, whether the charge is treason, murder, or piracy, or whatever the offence may be, as defined in an act of Congress. Motion overruled. Judgment on the verdict.

## MASSACHUSETTS DISTRICT.

OCTOBER TERM, 1871.

WILLIAM H. GREEN *et al.* v. BERNARD COLLINS.

BEFORE CLIFFORD AND LOWELL, JJ.

The general rule is, that in an action to recover the price of goods sold, it is no defence that the vendor knew that they were purchased to be sold in another jurisdiction in violation of the law of that jurisdiction, provided it was not part of the contract that they should be used for that purpose, and provided also that the vendor neither did nor agreed to do anything in aid or furtherance of the unlawful design, beyond the mere sale with knowledge of the intent of the purchaser.

Contracts in evasion or fraud of the laws of any State are invalid in our courts.

If it forms part of the contract that the seller shall do some act in furtherance of the illegal intention of sale by the vendee, such as concealing by packing the liquors, then the seller is a participant in the illegal transaction, and cannot enforce recovery.

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The vendor must yield no other aid to the intended illegal sale than the act of selling and delivery.

If the vendor takes part in the adventure, he cannot recover.

Sale in Rhode Island of liquors to be carried into the State of Massachusetts, of which vendor was aware. In the absence of anything on the part of vendor, except mere knowledge of the vendee's intention to sell the goods in Massachusetts, that sale was valid, and seller could recover in this court in Massachusetts, the sale being valid in Rhode Island, notwithstanding a statute in Massachusetts providing that no action should be maintained in any court of the State for the price of liquor sold in any other State for the purpose of being brought into this State.

THE plaintiffs were citizens of the State of Rhode Island, doing business at Providence in that State, and the defendant was a citizen of this Commonwealth, doing business at Milford in this district. On the 20th of May, 1867, he purchased a bill of liquors of the plaintiffs, valued at \$ 2289.62, and he having neglected and refused to pay for the same, the plaintiffs, on the 13th of February, 1868, brought an action of assumpsit against him in the Circuit Court for this district to recover the amount. Service having been made, the defendant appeared and pleaded the general issue. Evidence was introduced by the plaintiffs, tending to show that the defendant purchased the liquors of the plaintiffs at the time and place alleged in the declaration, on a credit of thirty days, and that the plaintiffs shipped the same to Woonsocket in that State, by order of the defendant. They were importers and wholesale dealers in liquors, and the proofs showed that they were duly licensed, and that the sale was valid by the laws of the State where it was made. Much testimony was introduced by the parties, which is not important to notice, as the only questions involved were presented in the refusal of the Court to instruct the jury as requested by the defendant. Three prayers for instruction were presented by the defendant, which were in substance and effect as follows: —

1. That the sale of the liquors in this case as made by the plaintiffs was a void sale; that the plaintiffs could not recover if the sale was made in violation of Chap. 86, § 61, Gen. Stat. Mass., or with the understanding, on the part of the plaintiff and the defendant, that the liquors were purchased by the defendant for the purpose of re-selling the same in this State, in violation of the laws thereof.

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2. That the repeal of that provision since the commencement of the suit did not deprive the defendant of the defence to which he was entitled at the time the suit was commenced.

3. If the liquors were sold upon the understanding that they were to be sold here in violation of any law of the State, the plaintiffs are not entitled to recover, although the law may have been repealed since the commencement of the suit.

*Caleb Blodgett, Jr.*, for plaintiff.

1. The first part of the defendant's first prayer for instructions, ending with the words "eighty-sixth chapter of the General Statutes of this State," was properly refused, whether the ruling as to the effect of the repeal of the same chapter was correct or not. The contract was made in Rhode Island, and the sale was valid by the laws of that State. Such a sale is not prohibited by the statutes of this State, and could not be. *Bligh v. James*, 5 Allen, 106.

2. The latter part of the first prayer and the second prayer are together substantially the same as the third, and all were properly refused, if the effect of the repeal of the statute is as the plaintiffs claim. "Any law," as used in the third prayer, must mean the eighty-sixth chapter of the General Statutes, which was the only law affecting the subject-matter of this suit at the time of the sale in Rhode Island, and also at the time the suit was commenced. If there is any defence to this suit it is given by § 61 of the chapter last named, and aside from this section, it is not true "that if the liquors were sold by the plaintiffs to the defendant upon the understanding that they were to be resold here in violation of law," the plaintiffs cannot recover. There must be something more than understanding or knowledge on the part of the plaintiff of the defendant's illegal design. *Holman v. Johnson*, Cowp. 341; *McIntyre v. Parks*, 3 Met. 207; *Webster v. Munger*, 8 Gray, 584.

*Charles R. Train*, for defendant.

The ruling of the court refusing the instructions prayed for was erroneous.

The plaintiff undertook to enforce a contract made in Rhode Island, injurious to the public rights, offensive to the morals,

contravening the policy, and violating the law of the State of Massachusetts, and such a contract cannot be enforced here, either in the State or Federal courts. 2 Kent, Com. (10th ed.), 316; *Story*, Conflict of Laws, § 253 and sub.; *Webster v. Munger*, 3 Gray, 584 and cases cited; *Blanchard v. Russell*, 13 Mass. 6; *Greenwood v. Curtis*, 6 Mass. 358; *Powers v. Lynch*, 3 Mass. 77; *Pearsall et al. v. Dwight*, 2 Mass. 84.

If the plaintiffs, when the contract was made, knew or understood that the liquors were purchased by the defendant with the intent to resell them in Massachusetts in violation of the law, and in contravention of the rights and policy of that State, the contract cannot be enforced. *Webster v. Munger*, 8 Gray, 584; *Bligh v. James*, 5 Allen, 106.

If the contract was made upon the understanding of the parties that the same were designed to be resold in Massachusetts, then the sale was made with a view to such illegal design, and for the purpose of enabling the defendant to effect it, and if so, the contract cannot be enforced. *Webster and Munger*, above cited; *Merchant's Bank v. Spalding*, 5 Seld. 53; *Foster v. Thurston*, 11 Cush. 322, and cases cited in the opinion.

The plaintiffs, having knowingly participated in a transaction intended to accomplish a purpose forbidden by law, cannot maintain this action.

The case of *McIntyre v. Parks*, 3 Met. 207, is not to be regarded as law since the case of *Webster v. Munger*, above cited.

The revenue laws of the United States expressly recognize the law of the States regulating the traffic in intoxicating liquors.

It is submitted that the case of *Holman v. Johnson*, 1 Cowp. 41, is authority only in cases affecting revenue laws, and does not conflict with the doctrine claimed by the defendant.

CLIFFORD, J. Errors of the court in improperly refusing to instruct the jury, as requested by either party, may be corrected on motion for new trial, as well as errors committed in rejecting proper testimony, or in admitting that which was improper, or in giving erroneous instructions to the jury. Certain prayers or instructions to the jury were presented in this case by the defendant, and the court refused to instruct the jury as he re-

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quested ; and the verdict of the jury having been for the plaintiff, the defendant moved the court that it be set aside, and for a new trial, upon the ground that the prayers for instructions were improperly refused.

Provision was made by § 61 of chapter 86, Gen. Stat. Mass., that all payments or compensations for spirituous or intoxicating liquors sold in violation of law shall be held to have been received without consideration, and against law, equity, and good conscience. No action of any kind, it is also therein provided, shall be had or maintained in any court for the price of any liquors sold in any other State for the purpose of being brought into this Commonwealth, to be here kept or sold in violation of law, under such circumstances that the vendor would have reasonable cause to believe that the purchaser entertained any such illegal purpose. Gen. Stat. Mass.; p. 448. Whether the plaintiffs knew or had reasonable cause to believe that the defendant purchased the liquors with the intention of transporting the same into this State, "to be here kept or sold in violation of law," was a matter in issue between the parties at the trial, and there was some evidence introduced on both sides of the question. Strong doubts were entertained by the court whether the affirmative of the issue was proved ; but it must be assumed, for the purpose of this investigation, that the evidence was sufficient to warrant the jury in finding the issue for the defendant. Conceded as the fact is, that the contract of sale and purchase was valid at the place where it was made, it is unnecessary to enter into any inquiry or discussion upon that subject ; and the plaintiffs contend, inasmuch as the sale of the liquors was valid where it was made, that the evidence introduced by the defendant is not an answer to the action, even if it does show that they had knowledge at that time that he intended to remove the liquors into this State, to be kept and sold in violation of the law of the State. Both the manufacture for sale and the sale of spirituous or intoxicating liquor, or of mixed liquor, part of which was spirituous or intoxicating, were at that time prohibited in this State by § 28 of chapter 61 of the General Statutes of the State ; and § 30 provided that whoever sold such liquor in violation of



the provisions of that chapter should pay ten dollars for the first offence, and be imprisoned not less than twenty nor more than thirty days. Gen. Stat. Mass., 442. Such prohibition was also extended by § 37 of the act, to the bringing of any spirituous or intoxicating liquor into the State, or to the conveying the same from place to place within the State, with intent to sell the same, or have it sold by another, and the person who did those acts was declared to be liable to the prescribed penalty and punishment if he had reasonable cause to believe that the liquor was intended to be sold in violation of that chapter. Nothing of the kind was done by the plaintiffs, but the defendant contends that they are not entitled to any remedy in the Circuit Court, sitting in this district, because they knew, or had reasonable cause to believe, at the time they sold the liquors, that he, the defendant, intended to transport the same into this State, to be here kept and sold in violation of that enactment of the State legislature. Stated as above, the proposition is not in the precise language of the prayer for instruction ; but it is not contended that the prayer for instruction meant anything more than the proposition, as the sale was an absolute one, and it is not pretended that there was any arrangement between the parties as to the place where the liquors should be sold.

Generally speaking, the validity of a contract is to be decided by the law of the place where it was made, unless it was agreed, either expressly or tacitly, that it should be performed in some other place, and then the general rule is that the contract, "as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." Story on Conf. of L. §§ 242, 280 ; *U. S. Bank v. Donally*, 8 Pet. 372 ; *Wilcox v. Hunt*, 13 Pet. 379 ; *Andrews v. Pond*, 13 Pet. 65 ; *Don v. Lippmann*, 5 Cl. & Finnell R. 13 ; *Fergusson v. Fyffe*, 8 Cl. & Finnell, 121. Contracts valid by the law of the place where they are made are generally valid everywhere *jure gentium*, and by tacit assent. 2 Kent. Com. (ed. 1866) 454. Remedies, therefore, are the same whether the suit is brought in the district where the contract was made, or in another district of the same circuit, or in any other Federal Court having jurisdiction of the

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parties and of the subject-matter in controversy. Viewed in the light of these several suggestions, the principal question presented is whether the evidence which shows that the plaintiffs knew, or had reasonable cause to believe, that the defendant at the time of the sale, intended to transport the liquors into this State, to be here kept and sold in violation of the law of the State then in force and unrepealed at the time the suit was commenced, constituted a defence. Marked differences of opinion are observable in the determination of courts of justice in cases where the facts were in most respects the same as in the case before the court; but the better opinion appears to be that the mere knowledge by the vendor that the vendee at the time of the purchase of property intends to use it for an illegal purpose will not, as a general rule, prevent the vendor from recovering from the vendee the value of the property.

Exceptional cases may arise in which a different rule must be applied, as where the property purchased is intended for treasonable purposes, or to commit murder, or to promote some other offence of such enormity, and so violative of the fundamental laws of society that silence on the part of the citizen is itself a crime, or would be evidence tending to show that the seller was an accessory before the fact to the commission of the offence. Many cases may doubtless be cited where it is held that a contract cannot be enforced which contemplates what the law forbids, whether the act forbidden be *malum in se* or only *malum prohibitum*, but those cases do not apply to a contract of sale which is valid by the law of the place where it is made, and where the only circumstance imputed as affecting its validity, is the mere fact that the seller knew, or had reason to believe, that the purchaser intended to remove the property purchased into another jurisdiction, and to sell it there in violation of the law of that jurisdiction. *U. S. Bank v. Owens*, 2 Pet. 527; *Harris v. Runnels*, 12 How. 79; *Kennett v. Chambers*, 14 How. 38.

Such exceptional cases may doubtless arise, but the general rule, and the one by which this case must be governed, is that in an action to recover the price of goods sold, it is no defence that the vendor knew that they were purchased to be sold in another

jurisdiction, in violation of the law of that jurisdiction, provided it was not a part of the contract that they should be used for that purpose, and provided also that the vendor neither did nor agreed to do anything in aid or furtherance of the unlawful design, beyond the mere sale, with knowledge of the intent of the purchaser. *Tracy v. Tallmage*, 14 N. Y. 167–210; *Curtis et al. v. Leavitt*, 15 N. Y. 15–47. Contracts made in evasion or fraud of the laws of another State are invalid everywhere in our courts, as if a contract is made to transport spirituous or intoxicating liquors, not entitled to protection as an imported article, in the original package, from one State into another in violation of the laws of the latter State, every such contract is void, even in the State where it was made, whether the sale is there prohibited or not; but the mere knowledge of the illegal purpose for which the goods are purchased will not have any such effect upon the contract of sale, as between the purchaser and the seller. Story Conf. of L., § 253.

Sales under the circumstances last suggested, and contracts, are valid, but if it enters at all as an ingredient into the contract between the parties that the goods shall be so transported to another State, and there be sold in violation of the law of that State, or that the seller shall do some act to assist or facilitate the illegal intention of the purchaser, such as packing the liquors in a way to conceal their character, or any other act to promote the illegal design of the purchaser, then the seller will be deemed a participant in the illegal transaction, and the contract will not be enforced. *Waymell v. Reed*, 5 Term, 599; *Lightfoot v. Tenant*, 1 Bos. & Pull. 551.

Participation of the vendor in the illegal design, as a general rule, renders the sale invalid as between the seller and purchaser, but that principle as exemplified in some of the cases, is extended quite as far as it ought to be carried, as, for example, it was held, in the case of *Langton v. Hughes*, 1 Maule & Selw. 593, that a person who sold drugs, well knowing that they were intended to be used in the brewing of beer, contrary to an act of Parliament, might be said “to cause or procure, *quantum illo*, the drugs to be mixed,” and used for that purpose. Much reason exists for supposing that the inference in that case was extended beyond what

is authorized from the fact proved, but if not, then the decision was correct, because if it enters at all as an ingredient into the contract of sale that the seller shall do some act to assist or facilitate the illegal intention of the purchaser, the contract will not be enforced for his benefit. Public policy dictates that the law will not lend its aid to any party whose cause of action is founded upon an immoral or illegal act, and if the seller of goods, even in a State where the sale of such property is lawful, enters into an arrangement with the purchaser as an ingredient of the contract of sale, that he will assist or facilitate the purchaser in selling the same in another State in violation of the law of that State, such a sale, as a general rule, is thereby rendered invalid, subject to certain exceptions which it is not important to notice in this investigation. Where the contract of sale is complete, and the seller has nothing to do with the disposition which the purchaser intends to make of the goods, Lord Mansfield held that the mere knowledge on the part of the seller that the purchaser intended to export them for sale in violation of the laws of the country where they were to be transported, would not debar the seller of his right of action to recover the value of the goods of the purchaser. *Holman v. Johnson*, Cowp. 341. Precisely the same point was ruled nearly forty years later in the case of *Hodgson et al. v. Temple*, 5 Taunt. 181, where it was expressly held that a person who sells goods, knowing that the purchaser intends to apply them in an illegal trade, is nevertheless entitled to recover the price if he yields no other aid to the illegal transaction than that of selling and delivering the goods.

Certain cases decided between those dates are sometimes referred to as sustaining a more stringent rule, but it is clear that they rest upon the qualification plainly admitted and explicitly annexed to the principle advanced in those two cases, that is, the seller of the goods yielded or rendered some other aid to the illegal transaction than that of selling the goods. *Biggs v. Lawrence*, 3 Term. 454; *Waymell v. Reed*, 5 Term. 599; *Clugas v. Penaluna*, 4 Term. 466. Where the seller takes an actual part in the illegal adventure, as in packing the goods in prohibited

parcels, he must take the consequences of his own act, but Lord Abenger held, in the case of *Pellecat v. Angell*, 2 Crompt. Mees. Ros. 311, that "merely selling to a party who means to violate the laws of his own country" is not a bad contract. Exactly the same rule was laid down in the case of *McIntyre v. Parks et al.*, 3 Met. 207, where it was held that the sale of lottery-tickets made in another State, where the sale was lawful, to a citizen of this State, is a lawful transaction, although the seller knew that the purchaser intended to sell the same in this State, where the sale was prohibited. But if the illegal use to be made of the goods enters into the contract, and forms the motive or inducement in the mind of the vendor to the sale, he cannot recover the price, provided the goods are actually used to carry out the illegal design. *Kreiss v. Seligman*, 8 Barb. 439. The express ruling of the Supreme Court of this State, in the case of *Dater et al. v. Earl*, 3 Gray, 482, was to the same effect, where it was held that a sale of goods in another State, the seller knowing but not participating in the intent to sell them again in violation of the laws of that State, will support an action in this State for the price. Equally explicit, also, is the rule laid down by the highest judicial authority of certain other States. The price of goods sold and delivered in a State where such sale is legal, say the court in *Smith v. Godfrey*, 8 Fos. 379, can be recovered in another State where such sale would be illegal if nothing remained to be done by the vendor to complete the transaction, and the seller is not in any way to be further connected with it; but if it be an ingredient in the contract that the goods shall be illegally sold, or that the seller shall do any act to assist or facilitate the illegal sale, or if the goods are to be delivered in the place where the sale is prohibited, the rule is otherwise. *McConibe et al. v. McMann*, 27 Vt. 95; *Backman v. Wright*, 27 Ibid. 187; *Jameson v. Gregory*, 4 Met. (Ky.) 363. Cases very nearly allied, it must be admitted, have been differently decided, but if they are carefully examined and compared one with another, the particular features by which they were distinguished are, with few exceptions, plainly to be seen.

Expressions are certainly to be found in the opinion of the

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court in the case of *Webster v. Munger*, 8 Gray, 587, which warrant the conclusion that the organ of the court on that occasion was of the opinion that a sale made with the knowledge of the seller that the purchaser intended to use the thing sold in violation of law, was illegal, and irrespective of the question whether it was an ingredient of the contract that the goods should be so sold, or that the seller should do any act to assist or facilitate the intended illegal use or sale, but the expression of such views was not necessary to the discussion of the case, as the statement shows not merely that the plaintiff had knowledge of the illegal purpose of the defendant, but that he sold with reference to it, and for the purpose of enabling the purchaser to effect it"; and the court here agrees with that court in the conclusion that the instructions given in that case, if viewed in that light, were "thoroughly sound in principle," and that they "do not conflict with the cases decided." Unless viewed in that light, the decision is directly opposed to the rule laid down in the case of *Sortwell v. Hughes*, 1 Curt. 245, decided by Judge Curtis, and which is an authority in this circuit, and in the judgment of this court expresses the true rule upon the subject. *Bligh v. James*, 6 Allen, 572.

Reference is also made to the case of *Cannan v. Bryce*, 3 Barn. & Ald. 179, as opposed to that rule; but the court is of a different opinion, as the chief justice who gave the opinion says in express terms that he is "speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for "the express purpose of accomplishing that object." Even the price of goods furnished to facilitate an immoral object, it was at one time held, might be recovered of the purchaser, unless it appeared, among other things, that the seller expected to be paid from the profits of the immoral vocation; but since the decision in the case of *Pearce et al. v. Brook*, Law Rep. 1 Exchq. 217, it must be regarded as well settled that no recovery can be had in such a case, if the goods were sold with the knowledge of the use to which they were to be applied, and that they were furnished to facilitate that object. *Bowry v. Bennet*, 1. Camp. 349.

icles, either of equipage or dress, sold or rented to a female  
ing a house of ill fame for the purpose and of a character to  
e her to make a display, will furnish no cause of action to  
ller or lessor of the articles, as the act of supplying a female  
ed in such immoral practices, would warrant a jury in find-  
at the articles were intended to facilitate the objects of her  
on. Sales under such circumstances may well be presumed  
re been made with the intent to facilitate the objects of the  
aser, and if so, then the contract is clearly void, and it is  
that ground that the decision of the court is placed. Dif-  
; rules also have sometimes been applied in the construction  
tracts made for the sale of goods in one country which are  
led to be exported and sold in another in violation of the  
ue laws of the latter country, but it is unnecessary to enter  
ield of inquiry, as there is nothing in the case to raise any  
question. Suppose, however, that the legal conclusion here  
ed cannot be sustained, still it is clear that the requested  
ctions were properly refused for other reasons, which will  
iefly explained.

supported by any legislative provision, the objection to the  
g of the court in refusing to give the instructions, would be  
ut any foundation, but the argument is that the defence  
prevail in this court because no such action could be main-  
d in the State court at the time this suit was commenced.  
essedly, no action of the kind could be maintained in the  
court at that date, but the provision containing that pro-  
on on the 22d day of May, 1868, was unconditionally  
led, and consequently at the time of the trial there was  
uch prohibition in the State law as is supposed. Sess.  
Mass., 1868, p. 115. By the docket entries it appears  
the parties went to trial on the 4th of June, 1869, and the  
d shows that the verdict was rendered for the plaintiffs on  
ollowing day. Before considering the effect of that repeal  
ould be repeated that the sale in this case was made in the  
of Rhode Island, and that such a sale was valid by the law  
at State, as expressly decided by the Supreme Court of this  
. *Bligh v. James*, 5 Allen, 106; *Merchant v. Chapman*, 4



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Allen, 362. When a statute is repealed, the general rule is that it must be considered the same as if it had never existed, except as to such transactions as are past and closed, or such as are saved by the repealing statute. *Surtees v. Ellison*, 9 Barn. & Cress. 750; Same Case, 4 M. & R. 586; *Key v. Goodwin*, 4 Moore & Payne, 341. Authorities may certainly be cited which assert that the repeal of a prohibitory statute does not make valid a contract entered into in violation of the statute repealed, but that rule of law has no application to the case before the court, as the contract was made in a place where it was legal, and the only supposed obstacle to a recovery by the plaintiff is that clause of § 61 of chapter 86, which provided that no action should be maintained in any court of the State for the price of any liquor sold in any other State, for the purpose of being brought here under the circumstances therein described. Attempt is made in argument to bring the case within the rule laid down in *Wright v. Oakley et al.*, 5 Met. 406, but the attempt is a vain one, as more than a year elapsed after the repeal of the first provision before the second was enacted. Sess. Acts Mass., 1869, p. 724. *Steamship Co. v. Joliffe*, 2 Wall. 458. Certainly the power of the legislature to pass the repealing statute will not be questioned, as the defendant could not have any vested right to set up the defence that the plaintiff should not have a right of action to recover on a valid contract. *Satterlee v. Matthewson*, 2 Pet. 380; *Watson v. Mercer et al.*, 8 Pet. 108; *Welch v. Wadsworth*, 30 Conn. 156; Cooley's Con. Lim. 293; *Way et al. v. Hillier et al.* 16 Ohio, 107; *The Syracuse Bank v. Davis*, 16 Barb. 190; *Hepburn v. Curts*, 7 Watts. 300; *King v. Tirrell*, 2 Gray, 331; *Gerry v. Stoneham*, 1 Allen, 320; *Garfield v. Bemis*, 2 Allen, 447. Satisfactory proof was introduced by the plaintiffs that they were duly licensed to sell such liquors at their place of business, and, it being conceded that the contract was valid at the place where it was made, it is clear that the provision in question, even if unrepealed, could not have any effect in the Circuit Court to defeat the plaintiffs' right of action in this case, as they are citizens of another State. Doubts may at one time have existed upon the subject, but it is now well settled that a State law cannot dis-

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charge or suspend the obligation of a contract made in another State, if it was legal where it was made and was a contract with a citizen of another State, not even if it was to be performed in the State whose law is invoked to defeat the remedy. *Baldwin v. Bank of Newbury*, 1 Wall. 236; *Demeritt v. Exchange Bank*, 20 Law Rep. 606; *Hunt v. Danforth*, 2 Curt. 604; *Suydam v. Broadnax et al.*, 14 Pet. 74; *Union Bank v. Jolly*, 18 How. 503; *Watson v. Tarpley*, 18 How. 520; *Hyde et al. v. Stone*, 20 How. 175.

Contracts are to be construed and carried into effect according to the intention of the parties thereto, and they are presumed to contract with reference to the law of the place where they reside and transact business, unless a different intention is manifest from the terms which they employ. *Judd v. Porter*, Greenl. R. 337. The law of the contract travels with it wherever the parties thereto are to be found, and into whatever forum resort is had for its enforcement. Motion for new trial overruled. Judgment on the verdict.

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## MAINE DISTRICT.

APRIL TERM, 1872.

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GEORGE F. EMERY *et al.*, Assignees in Bankruptcy, Petitioners, v.  
THE CANAL NATIONAL BANK.

A creditor, holding commercial paper signed by a firm in bankruptcy, and indorsed by an individual member of the firm, a bankrupt, though not a sole trader, may prove his debt against both estates and share in the dividends of each.

PROCEEDINGS in bankruptcy were instituted against Nathan M. Woodman and Clement Littlejohn individually, and as co-partners doing business under the firm name and style of Woodman and Littlejohn, and they were regularly adjudged bankrupt under the act of Congress to establish a uniform system of bankruptcy throughout the United States. The petitioners represented that they were the assignees of the bankrupts, and that

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the corporation defendants did on the 5th of September, 1871, prove against the co-partnership estate of Woodman and Littlejohn one certain draft, and two certain promissory notes, described in the petition, and that on the 21st of October following, the said defendants did also prove said draft and notes against the individual estate of the said Nathan M. Woodman, that said defendants discounted said notes at the request of said Woodman, with knowledge that said Woodman was a member of said firm, that they had never withdrawn either of said demands, but claimed to receive a dividend from both the co-partnership and individual estates, against which said draft and notes have been proved, and they further showed that said Woodman was not a sole trader at the date of the draft or notes, and never had since been to the date of the proceedings in bankruptcy, and alleged that they were advised, and believed as matter of law, that said claims were not provable against both of said estates, and prayed that the defendants might be compelled to elect the one from which they would receive their dividends. They presented their petition to the district court, but it appearing that the District judge was so concerned in interest as to render it improper for him in his opinion to sit on the hearing of the petition, the case was removed into this court under the act of the 3d of March, 1821, which gives the Circuit Court jurisdiction in such cases. 3 Stat. at Large, 643. Service was made in the District Court, and the defendants, before the case was removed into this court, demurred to the petition, and prayed that the same might be dismissed. Woodman and Littlejohn were the drawers and first indorsers of the draft, and they were the makers and first indorsers of one of the notes, and the payees and first indorsers of the second note. Woodman was the second indorser on each of the three instruments.

*George F. Emery, and Mattocks, and Fox, for petitioners.*

*W. L. Putnam, for respondent.*

CLIFFORD, J. Undoubtedly the defendants as the holders of the draft and notes might have proceeded separately against the partnership, and the individual member who had become the second indorser, and they would have been entitled to judgment

in each suit, though they could have but one entire satisfaction. In the case of a mere joint and several contract, the holder must at law elect a joint or several remedy, but the rule is otherwise where there are distinct contracts, though one may be incidental or collateral to the other, as for example a party may be liable on a bill or note in two or more capacities, and in such a case he may be the object of more than one action on the same bill or note at the suit of the same plaintiff, as where a party is sued jointly with others as a drawer or promisor, and separately as indorser, which is the nature of the bankrupt's liability on the draft and notes in this case. *Wise*, 9 Price, 393; *Byles on Bills*, 322; *Chitty on Bills*, 539; 2 *Pars. on Bills and Notes*, 459.

Precaution was taken by the defendants in this case to secure the joint obligation of the partnership, and the several and separate obligation of one of the partners, as they might lawfully do at the time they discounted the draft and notes, and it is clear that at common law full effect is given in such a case to the respective contracts. Originally the rule established by the English courts excluded double proofs except perhaps in a limited class of cases. It was first promulgated in the case of *Ex parte Rowlandson*, 3 Peere Wms. 405. In a case founded upon a joint and several bond, Lord Talbot at first inclined to think that the petitioner, being a joint and several creditor, ought to be at liberty to come under each of the commissions, provided he received but a single satisfaction; but finally held that the petitioner ought to be put to his election under which of the two commissions he would come. He relied, to support his conclusion, upon the rule of law, which precludes a party from proceeding jointly and severally on the same bond at the same time, and expressly distinguished the case from one decided ten years earlier, in which a creditor was allowed to prove against a firm, and also one of the members, on his separate bond for the same debt, which is the same in principle as the case before the court. *Horsey's case*, 3 Ibid. 23. Unsatisfactory as the reasons given for the rule are, still the rule was adopted and enforced in many subsequent cases. *Ex parte Parminter*, 1 Atk. 99; *Ex parte Bond & Hill*, 1 Ibid. 98; *Ex parte Banks*, 1 Ibid. 106. Much

diversity of opinion has arisen upon the subject in the courts of the parent country at different periods. It was established, said Judge Story at an early period, but was afterwards departed from, and was again re-established, and it now stands as much if not more upon the general ground of authority and the maxim *stare decisis* than upon any solid ground of equity or sound reasoning. Other cases adopted the same rule and held that the creditor in such a case must elect, and that he could not be allowed to prove his debt against both estates. *Ex parte Beavan*, 10 Ves. 107; *Ex parte Hay*, 15 Ves., 4. In the first case Lord Eldon said he never could see why a creditor having both a joint and several security should not go against both estates, but regarding the rule as settled otherwise, he denied the right. Exceptions, however, were subsequently admitted in several cases. They were of three sorts: 1. Where the joint creditor was the petitioner for a separate commission against the bankrupt partner. 2. Where there was no joint estate, and no living solvent partner. 3. Where there were no separate debts. Story on Part. § 378; Collier on Part. 963; *Ex parte Le Forrest*, Montg. & Bligh, 44. Double proof, however, was allowed by the commissioners, and on appeal to the court of review the four judges were equally divided; but the chancellor, on appeal to him, affirmed the judgment of the two judges who were against double proof, placing his decision upon the ground of authority. *Ex parte Moults.*, Montg. 337; same case, Montg. & Bligh, 28; same case, 2 Dea. & Cl., 419.

Efforts were still made to induce the courts to adopt the opposite view, and agitation upon the topic never ceased in the courts till the question was carried to the House of Lords, where it was finally determined that double proof should not be allowed in any case, which had the effect to transfer the question from the courts to the legislative department. Double dividends in case of distinct firms with common members, and in case of a sole trader, who was a member of a firm, were allowed by the subsequent bankrupt act of that country, overruling to that extent the decision of the court of last resort. Provision is there made, that where any debtor shall, at the time of adjudication, be liable upon any bill of exchange or promissory

in respect of distinct contracts, as member of two or more firms, carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader, also as the member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts. *Doria & McRae's Bankr.*, App. 194. Obviously that provision is confined to joint and several bills of exchange and promissory notes, and for that reason was repealed and replaced by a provision more comprehensive and better suited to give all parties their just and legal rights.

By the act of Parliament to consolidate and amend the law relating to bankruptcy, passed the 9th of August, 1869, it is enacted that if any bankrupt is, at the date of the order of adjudication, liable in respect of distinct contracts as member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of such contracts against the properties respectively liable upon such contracts. *Robeson's Bankruptcy*, 579; *Bulley v. Bund*, Bankruptcy App. 18. Proof was admitted by the Registrar in the case of a joint and several promissory note, which was signed by two members of a firm, and by the firm and several other persons. The firm, having become bankrupt, the holder of the note proved the same against the joint estate of the firm, and the separate estates of the two partners who had also signed the note. Appeal was taken from the order of the Registrar to the Court of Chancery Appeals, and the court held that the holder was entitled to prove against, and receive dividends from, both the joint estate of the firm and the separate estates of the two partners who had also signed the note and been adjudged bankrupt. It was insisted for the appellants that inasmuch as the last act did not contain the words, "and receive dividends," it required the creditor to elect whether he

would receive his dividends from the joint estate or from the separate estates, and that he could not receive them from both ; but the court held otherwise, and decided that inasmuch as there was a joint contract by the firm, and a separate contract by members of the firm, the creditor might prove his claim against both estates, and that the whole act was framed on the plan that a right of proof carried with it a right to a dividend. Mellish, J., admitted that the old rule was as contended by the appellants, and that he had some doubts at first whether the section applied to every case of a bill of exchange drawn by a member of the firm on the firm, or of a joint and several promissory note indorsed by the members of a firm, but seeing that the persons called sole traders are also called sole contractors in the same provision, he held that the two designations meant the same class of persons, and that the enactment was intended to include a joint and a several promissory note, and was not to be confined to cases where the parties had executed separate instruments. He enforced that view by various considerations, and in conclusion stated that a joint and several note, though it is one instrument, contains both a joint contract and distinct separate contracts by the several makers, and decided that it was the intention of Parliament that wherever there was a joint and separate contract, and joint and separate estates being administered in bankruptcy, the creditor should be entitled to prove against both the joint and separate estates.

Beyond doubt the opposite rule was the old rule in England ; but it was never adopted in this country, and it was expressly repudiated by Judge Sprague in *Ex parte Farnum*, 6 Law Rep. 21, in an opinion of great research and ability. Learned judges in the course of nearly a century and a half since it was first adopted, have often attempted to vindicate the old rule as consonant with the just rights of creditors, but never have succeeded to the satisfaction of the legal profession. Some have attempted to vindicate it by analogy to the inability of the creditor at common law to bring joint and several actions at the same time. *Ex parte Rowlandson*, 3 Peere Wms. 407 ; Robeson's Bankruptcy, 519. Many others assign as the founda-



tion of the rule, that if a joint and several creditor is permitted to prove against both the joint and separate estates, he would draw from the separate estate to the prejudice of the other joint creditors who ought to have an equal right with himself in that estate, which would create a preference inconsistent with the principles of the bankrupt law. *Ex parte Bond*, Atk. 100. Throughout that period, however, the rule has been opposed by many judges as an arbitrary one, and one not founded on any sound principle. *Ex parte Bevan*, 10 Ves. 107 ; *Ex parte Henton*, De Gex. 550 ; *Ex parte Goldsmith*, 1 De G. & J. 454. Judge Sprague said that he was not able to discover any sound principle upon which it rested, and that it had generally been admitted, even by those who enforced it, that it is as little consonant with justice as with the rules of law.

Attention is very properly called to the fact that he was expounding the bankrupt law of 1841 ; but it is as true now as it was then that the old rule has never been adopted in this country, and that existing contracts have been made under and with reference to the rule of law which gives to a party having two valid obligations the benefit of both, and in view of that consideration he remarked that he did not think himself bound or authorized to set aside a right which he regarded as founded both on law and justice, on account of an arbitrary rule justly reprobated by some of the most eminent judges and jurists in England, and which was never recognized in this country. Story on Part. § 382 ; *Borden v. Cuyler*, 10 Cush. 476. Power to establish uniform laws on the subject of bankruptcies throughout the United States is vested in Congress, and Congress having executed that power, the question under consideration must depend upon the proper construction of the provision in that behalf in the bankrupt act. Bankrupts, as all experience shows, may be liable at the time of adjudication, upon a bill of exchange, promissory note, or other obligation, in respect of distinct contracts as members of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as sole traders, and also as members of a firm, and § 21 of the bankrupt act provides that in such

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cases "the circumstance that such firms are in whole or in part composed of the same individuals, or that a sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts." 14 Stat. at Large 527. Tested by the concluding part of the section as transcribed, § 21 of our bankrupt act is an exact copy of § 152 of the English bankrupt act of 1861, but the introductory parts of the sections differ, as the English act is confined to bills of exchange and promissory notes, whereas our bankrupt act extends in that behalf also to "other obligations"; showing that it was the intention of Congress to give it a more comprehensive operation, as indicated by the addition of the words "or other obligation" to the words "any bill of exchange or promissory note," contained in the said English bankrupt act. Two classes of persons are mentioned in the first part of the section, as embraced in the provision, namely, any bankrupt liable upon any bill of exchange, promissory note, or other obligation, in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy. 2. Or as a sole trader, and also as a member of a firm; and the argument for the petitioners is that the term "sole trader" is used in a technical sense, and that it cannot be construed to include a sole contractor, as in the case of the indorsement of a promissory note by a separate member of the firm, which is signed by the firm as promisors. Considered separately, the first part of the section would afford strong support to that proposition; but the whole section must be construed together, and the last part provides that the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent such proof and the receipt of dividends; showing to the satisfaction of the court that the term "sole trader" is not used in a technical sense, and that its meaning was intended to be enlarged by the latter part of the section, as was held by the court in the case of *Ex parte Honey*, to which reference has already been made. True, the

words "sole trader" are not used in the last English bankrupt act, but they were used in the former act, and the court held in the case referred to that those words when considered in connection with the closing part of the section, which is precisely the same as the closing part of the corresponding section in our bankrupt act, meant nothing more than the words "sole contractor," and that the enactment was intended to include a joint and several promissory note, and that it ought not to be confined to cases where the parties had executed separate instruments. Much consideration has been given to the question by several of the District judges, and in every such case which has fallen under my observation, the judge has come to the conclusion that the rule which allows a party holding two valid obligations, the benefit of both, is founded in law and justice, and that it is sustained by the true construction of § 21 of the bankrupt act. *Meade v. Bank of Fayetteville*, 2 N. B. R. 65; *Ex parte Bigelow*, 2 N. B. R. 121; *Ex parte Howard*, 4 N. B. R. 185; *Meade v. Bank of Fayetteville*, 6 Blatch. 185. Creditors, before any act of bankruptcy is committed by their debtor, may acquire a right to prove their claim against the joint estate, by one contract, and against the separate estate by another, and it is not possible, it seems to the court, to assign any good reason why a subsequent act of bankruptcy should be held to deprive them of the benefit of their caution and diligence. English judges and legislators have at last come to that conclusion, and there is no good reason why the courts in this country should adopt a rule which at last has been exploded and abandoned in the tribunals where it was first adopted. Their debts are certainly provable, and the estate must, by the express terms of the act, be distributed among all creditors whose debts are duly proved. Bump. Bankruptcy, [5th ed.] 198; *Ex parte Downing*, 3 N. B. R. 182.

## MASSACHUSETTS DISTRICT.

OCTOBER TERM, 1872.

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ELIZA J. H. ANDREWS *et al.* v. HENRY D. HYDE *et al.*

Repeated decisions of the Federal Courts have established the rule that oral evidence is admissible for the purpose of showing that a deed absolute on its face, was intended as a mortgage, and that the defeasance was omitted from mutual confidence between the parties.

The evidence to prove the agreement ought to be clear and satisfactory, as the rule is one of exceptional character in the law of evidence.

Where the evidence to prove the agreement, was that of only one of the parties, the other having deceased, and was uncorroborated by any word or act of the other, proof of friendly relations existing between the parties is not sufficient where the evidence is otherwise subject to doubt.

Where witnesses are not excluded on account of interest in the event of the suit, the rule still applies that their veracity or impartiality may be affected by such interest.

Something is due in such a case as this, to the denials of the answer to the effect that the conveyances were not made as security for any indebtedness.

Where the allegation of the bill is that certain real estate was conveyed to a deceased person as security for a debt, the complainant is not entitled to a decree upon the uncorroborated testimony of a single witness, and certainly not unless his statements are positive, and he appears to be without prejudice, bias, or interest adverse to the respondent.

THE complainants were the assignees in bankruptcy of the  
" Horatio Woodman, and the respondents were the heirs  
of the estate of John A. Andrew, late

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the lands only as security as aforesaid, and that he would reconvey said real estate to said Woodman when he should pay the amount of the loan and interest. Based upon these allegations, the prayer of the bill was that the complainants might be permitted to redeem the said lands, and for an account. The principal deed in question was the one first described, which was acknowledged on the day of its date, and was recorded on the 26th of the same month in the proper registry of the county where the land is situated. It acknowledged the receipt of three thousand dollars, which the grantor told one of the witnesses was the full value of the land. When conveyed, the land was wild land, neither party occupying it. Service was made, and the respondents appeared, and filed an answer in which they denied that the land was conveyed as a security, and averred that the conveyance was absolute and not as security. Testimony was taken, and the District Court entered a decree for the complainants, from which decree the respondents appealed to this Court.

Woodman testified that the deeds were never in the possession of the grantee, that they remained in his possession until the appointment of his assignees in bankruptcy, that the deeds were made as security for present and future loans, that at the date of the first deed he was owing the grantee \$3,540.91, and that at the time of his death, October, 1867, he owed him \$7,000.

*H. W. Paine* and *C. M. Ellis*, for appellants.

*H. D. Hyde*, for appellees.

CLIFFORD, J. The testimony was full to the point that the deeds were given as security, and, if so, the complainants must be permitted to redeem, and they are entitled to an account as prayed in the bill, as repeated decisions of the Federal courts have established the rule that oral evidence is admissible for the purpose of showing that a deed absolute on its face was intended as a mortgage, and that the defeasance was omitted from mutual confidence between the parties. *Wyman v. Babcock*, 2 Curt. 386; *Babcock v. Wyman*, 19 How. 299; *Russell v. Southard*, 12 How. 139. Argument to support that rule of law is unnecessary, as it is well settled by authority, but the evidence to prove the

agreement ought to be clear and satisfactory, as the rule is one of an exceptional character in the law of evidence. Unquestionably the issue in this case depends entirely upon the credit to be given to the party who made the conveyances, in a case where he is not corroborated by any act or word done or spoken by the other party.

Attempt is made to show that he is corroborated by certain circumstances in the case, but the circumstances relied upon are too remote or too slight, in the judgment of the court, to have any substantial weight in that regard. They are as follows: 1. That friendly relations had existed between the parties for many years; but it is difficult to see how that fact tends to show that it was agreed between them that a deed absolute on its face should be held merely as a security for money loaned, and that the grantor might redeem the same at any future period of time during his natural life. Woodman admits that he was buying and selling land-warrants and lands during that period, and it is not unreasonable to suppose that he would be as ready and willing to sell to a friend as to a stranger, especially as it appears that the lands in question cost him only about one dollar per acre. Having purchased the land cheaply, it is quite as probable that he might be willing to give his friend a good bargain for prompt payment, as that his friend should agree to allow him an indefinite and unlimited right of redemption in the lands. 2. That the grantee paid the taxes. The only evidence of that fact is found in his own testimony, and if credit is not given to the witness, the fact is not established. Payment of the taxes, if made by the grantor, could have easily been proved, but the fact, if established, would not amount to much, as persons holding Western lands frequently employ agents to pay their taxes. 3. That the grantee retained the possession of the original deeds. The fact as shown in evidence is, that the grantee did not have the deed first described. On the contrary, it was sent to the registry of deeds, where it remained for a long time. True, he states in his deposition that the deeds were returned to him as soon as they were recorded, and that they were retained by him, and remained in

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his possession until the appointment of his assignees, but it appears from the deposition of Augustine Jones, that Woodman, in August, 1870, told him that the deeds were in the office of the registry of deeds in Iowa, and that he would send for them, and that at a subsequent time, when the witness called for the deeds, he told him that they had not arrived. Super-added to that, is the letter of Woodman to that witness, dated September 8, 1870, in which he states that he has received "the original deed from me to Governor Andrew of the Shelby County land, which I enclose to you with two cancelled agreements" therein described, showing that the pretence that he had the deeds in his possession all the time, is unfounded. Such a pretence is invoked, as showing that the deeds were under his control as the real owner of the property, but the pretence being disproved, it tends to discredit the witness, instead of confirming his testimony. Had he retained the deeds, as the pretence is in his testimony, something doubtless might be inferred from that circumstance in support of the theory of the complainants, but he having set up that theory in his examination, in chief, and the pretence being disproved, it must be assumed that the circumstance tends to discredit the grantor as a witness, especially as it is not shown by any other witness that he ever claimed any interest in the land during the lifetime of the grantee, or that the grantee ever in any way recognized the pretence that he had any interest in the lands.

Nothing certainly can be inferred in support of the theory of the complainants from the character of the supposed transaction, as the story is quite improbable on its face. It is that the grantor executed an absolute deed of lands, put it on record without the knowledge of the grantee, and kept it a secret from him for the period of three years, without anything to show that the deed was not what it purported to be, both of the parties having experience as conveyancers, and being well aware of the necessity of a defeasance of some kind, and that the same condition of things was continued four years longer, after the grantee was informed of the conveyance, without any step being taken by either party to supply the



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omission. Such men, whether friends or not, would not be likely to leave their rights in such uncertainty. Much strength is added to that view from the fact that the grantor from September, 1866, to March 20, 1867, was not indebted to the grantee at all, and yet, as the theory of the complainants is, the title was allowed to stand in the name of the grantee as a security for indebtedness, when nothing was due to the party holding the absolute estate. Debtors are frequently negligent in procuring a renewal of an expiring defeasance in cases where they have been in fault in not making the stipulated payments to their creditor, but when the whole incumbrance is paid, they are much less likely to remain quiet without some written assurance that their rights will be respected.

Administration on the estate of the grantee was first granted to William Rogers, and it appears that the grantor in those deeds was one of the appraisers. Jones was the other, and he testifies that Woodman never, in any of their consultations, stated that his notes to the intestate were in any way secured, and it does not appear that he made any such disclosure when, at a subsequent period, he was appointed administrator *de bonis* of the same estate. In his deposition he states that when these deeds were executed, he was indebted to the grantee in the sum before mentioned, which was secured by the conveyances, but Jones says that in their conferences as appraisers, he never mentioned that the notes were secured, that he did say, at another time, that the deeds were given to secure the sum of \$7,000, and that it was agreed at the time the deeds were made, that they should be security for that sum. Contradictory statements are certainly calculated to impair the credit of a witness, and it is clear that the statement that such an agreement was made at the time the deeds were made, is utterly inconsistent with his testimony given in the case, that the grantee did not have any knowledge of the deeds for three years after they were made and forwarded to be recorded. His statements also to Jones are inconsistent with each other, as at another time he told him that the land conveyed was worth just about \$8,000, which was the amount borrowed of the grantee, and

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that after 1860 he never owed the grantee less than that amount, which cannot be true, if he is to be believed, as he testifies that he owed him nothing from September, 1866, to March 20, 1867, as before explained. He is also contradicted in other particulars. He told Jones he paid the interest regularly, that he took no receipts, and that the notes with the endorsements of interest were all destroyed. Interest was not paid as there stated, as conclusively appears from the letter of the grantee, dated December, 1862, to the grantor, which is an exhibit in the case. When cross-examined in respect to those exhibits, Woodman admitted that they showed that he did not pay interest from December 1, 1862, to March, 1867, a period of more than four years. Important parts of the relation he gives of his dealings with the grantee, are materially erroneous, if not wilfully false. He claims that his exhibit of those matters is taken from his note-book, and that the statement shows the true state of his indebtedness, but the administrator produces a large number of notes and checks to the amount of \$1,300, to which the witness does not allude in his account, which goes very far to show that no reliance can be placed in his statements as to their dealings, or the amount he owed the grantee when the deeds were given. Witnesses are no longer excluded on account of interest in the event of the suit, but the proof of interest affects the credit of the witness now, as well as before, the passage of the act not changing the rule in that regard, as it shows that the witness is not impartial, that he has a motive to color his statements or to suppress the truth or to state what is false.

Woodman is not impartial, though decreed to be a bankrupt before he testified, as he was a defaulter to a large amount to the estate of the deceased grantee, from which he could not obtain a discharge in the bankrupt court. No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, can be discharged by the bankrupt court in any case. 14 Stat. at Large, 533. As administrator of the estate, he is a defaulter to the amount of \$6,759.39, for which he cannot be discharged under the bank-

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rupt act, but if he can establish the theory that those deeds are mortgages, and compel the legal representatives to get the pay for the claim out of those lands, he will be relieved from that liability and embarrassment. Something also is due to the absolute denials of the answer, in which the respondents not only deny that the real estate was conveyed as a security for any indebtedness, but aver their belief that the deeds were made as absolute conveyances and not as a security. Administrators and heirs cannot be supposed, in such a case, to have personal knowledge upon the subject, but the decision of the Supreme Court warrants the conclusion that in such a case the complainant is not entitled to decree upon the uncorroborated testimony of a single witness, certainly not, unless his statements are positive and the witness appears to be without bias, prejudice, or interest adverse to the respondent. *Carpenter v. Insurance Co.*, 4 How. 218. Grave doubts are entertained whether a decree in such a case ought ever to be made upon the uncorroborated testimony of the grantor, but it is not necessary to decide that point, as the court is clearly of opinion that such a decree ought not to be made where it appears that the witness is interested adversely to the respondent, is contradicted by another witness, and has himself given false and contradictory accounts of various matters material to the issue, and, especially, where it appears that the claim has been long delayed and was never made in the lifetime of the grantee. Claims of the kind are easily made, and unless full proof is required to sustain them, it is to be feared that the estates of dead men will afford much less comfort and support to their widows and minor children than the decedents supposed the estates would, while they were expending their strength in toil and industry to earn and save the property for that purpose.

Decree reversed and bill dismissed with costs.

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**JONATHAN AMORY v. AMOS A. LAWRENCE, THOMAS J. COOLIDGE, SARAH LAWRENCE, wife of AMOS A., HETTY COOLIDGE, wife of THOMAS J., WILLIAM APPLETON, CHARLES H. APPLETON, and THOMAS C. AMORY.**

It is the settled rule in the Federal courts that oral evidence is admissible to show that a deed absolute on its face was intended as a mortgage.

The complainant being indebted in a large sum, conveyed certain real estate to one Otis, upon an agreement with one Appleton, that he should pay the amount due the complainant's creditors, and take a transfer of the property conveyed, and account to the complainant for the balance left of the property after he had paid himself the amount advanced, and interest. The trustee was to hold the property as security for the money advanced. *Held*: The conveyance, though absolute on its face, was, under the decisions of the Supreme Court, a mortgage.

After the trustee had been repaid, the rents and profits of the property in the trustee's hands was a debt or liability not under seal, for which the trustee was responsible to the complainant, and as such, constituted a good cause of an action of contract or suit in Equity.

But the claim in this case was barred by the Statute of Limitations.

The construction given to State Statutes of Limitations, by the courts of the States in which such Statutes are enacted, furnish the rule of decision in the Federal courts in cases where they apply.

The Courts of Equity in Massachusetts apply the Statute of Limitation in suits in equity.

The Statute of Limitations in this case began to apply when the complainant first became aware that the trustee had been repaid for his advances out of the proceeds of the sale or the rents and profits of the real estate conveyed to him, and knew what his rights in the premises were.

The claim against the executors of the deceased trustee, for the balance in the hands of the trustee of moneys collected in execution of the trust, beyond the amount advanced and interest, was held to be barred by the Statute of Limitations, the complainant having known, twelve years before the filing of the bill, that the trustee had been repaid for such advance and interest.

Where an absolute deed is intended as a mortgage, a subsequent purchaser with notice, stands in the place of the equitable mortgagee.

Six years is no bar to redeem a mortgage, nor is the plea of *laches* any defence to the suit, unless they are shown to have extended to the period of twenty years.

Courts of Equity, in the case of a mortgagor coming to redeem, have fixed upon the term of twenty years after forfeiture and possession taken by the mortgagee, no interest having been paid in the mean time, and with no circumstances accounting for the neglect, as a period beyond which the right of redemption shall not be favored.

Lapse of twenty years without any recognition of the complainant's rights to redeem the mortgaged premises, consisting of the undivided seventh part of the dower estate of the complainant's mother, and which the trustee in his lifetime conveyed to the last named respondent, was not shown in this case.

In this case, the property covered by the complainant's claim against the trustee (which claim the complainant purchased from the assignees in bankruptcy), was property not

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taken possession of by the assignee, to which the title of the bankrupt is good against all the world, except the assignee or any one to whom he might convey.

An assignee in bankruptcy is not bound to take property which may be onerous to the estate, or burden instead of benefit it. If he does not take it it remains in the bankrupt.

After the lapse of years, in this case, the court held that the conclusion must be that the assignee elected not to take possession of certain property of which the complainant when a bankrupt took an assignment as set forth in the bill.

Reasonable presumptions are admitted by a demurrer, as well as matters expressly alleged. The allegation in the bill was sufficient, although it did not state that the assignment of the claim against the trustee was under an order of Court first made, because the presumption is that such sale was made in conformity to such an order, and because, independently of the assignment, the bankrupt's title was good against all the world if the assignee elected not to take the property as not beneficial to the state.

Waiver by the bill of oath in the answer, amounts to nothing unless accepted by the respondents.

BILL in equity praying for an account from the executors of William Appleton of certain real and personal estate conveyed by the complainant to said William Appleton during his life, and of the receipts derived therefrom, either from its sale or as income, and that said executors might be decreed to pay to the complainant all such sums as might be found due him on such accounting. The bill also prayed that one of the respondents, Thomas C. Amory, might be decreed to account for and pay to the complainant certain rents, profits, and receipts derived from certain real estate alleged to have been conveyed to said Thomas C. Amory by said decedent, William Appleton, and to reconvey said real estate to complainant.

The complainant being indebted in the sum of \$10,000 to Isaac Coffin, on July 26, 1831, conveyed to William F. Otis certain real and personal property, including his reversionary interest in the dower set off to his mother in his father's estate. That conveyance was made upon an agreement with William Appleton, deceased, that he should pay the amount due to his creditor, and take a transfer of the property conveyed, and account to the complainant for the balance left of the property after he had repaid himself the amount advanced for the transfer and interest. In 1832 the complainant with his family removed to New York and remained there until 1842, when he returned to Massachusetts.

In 1840, while residing in New York, he failed in business and

In the following year went into bankruptcy and obtained a certificate of discharge in 1853. Until the year 1860 he was ignorant whether the decedent Appleton had been paid or not, what he had advanced on the complainant's account, but he believed as early as 1847 that he had been paid the full amount. The complainant's mother died in 1847, and one seventh of the estate held by her as dower reverted to the decedent. The complainant's confidence in the decedent, Appleton, remained undiminished, as he did not know the amount he had realized from the personal estate, nor what disposition he had made of his share of his father's real estate; but when he became convinced that Appleton intended to retain his, the complainant's share, in the dower state, his confidence was much shaken, and he then requested the decedent to render his account of his receipts from the property so conveyed by the complainant. They had before that time frequently spoken of the trust property, and Appleton had never intimated that he did not intend to account for the proceeds, and when he requested the account, the decedent recognized his right, but would not agree definitely to make the account. Appleton told the complainant that it would be impossible to tell what the receipts would be until his share in his father's estate was all sold, and intimated that the property would not sell for more than enough to pay him the decedent.

Repeated requests were made for the account, but the requests were always refused, the decedent asserting that he had not been paid the amount advanced. After his failure, the complainant was in reduced circumstances, and dependent upon his friends for a considerable portion of the income necessary for his and his family's support. Small amounts were paid by the decedent prior to 1850, and at that time in consequence of complainant's demands for an account, the decedent agreed to pay the complainant \$600 per annum, which has ever since been paid.

In 1860 he was enabled to have an examination made of the accounts, and being advised to purchase from his assignees in bankruptcy his claim against the decedent, he "accordingly procured an assignment" of the same, and he then ascertained the accounts to be as set forth in the bill of complaint, which

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showed that he was justly entitled to a large balance beyond the amount advanced and interest. In 1832 the decedent paid the complainant \$5,000, in 1842 \$400, in 1856 \$1,600, in 1858 \$600, annually as agreed, making an amount not exceeding 10,000. The income derived from the property held in trust, must have been at least \$20,000, and the net receipts of the decedent beyond his advances, at least \$5,000 up to 1862, when the account closed, as stated in the bill. The complainant caused a statement of the whole matter to be made, and sent to those most interested in his welfare, hoping that publicity would force the decedent, then alive, to do him justice, but his friends being opposed to his cause, refused him any aid, without which it was impossible for him to proceed to suit. On the 27th of January, 1862, the decedent conveyed one seventh of certain real estate to complainant's brother, Thomas C. Amory, which estate was worth at least \$15,000, and at the time of the conveyance the grantee had full knowledge that the grantor held the same as trustee for the complainant, and that the complainant was doing all in his power to recover it.

In 1862 the trustee, William Appleton, died, and before his death caused the complainant, through Thomas C. Amory, to be informed that he had left with his executors a file of papers relating to his rights of property conveyed to the decedent, and that his executors had directions to see that his, complainant's, rights were acknowledged, and that the property was restored to him. Expressions of regret on the part of the trustee, were also conveyed to the complainant, that justice to him had been delayed until it was impossible for the trustee to settle the matter personally with the complainant.

The complainant called the attention of the executors and devisees to the matter, but they refused to investigate his claim.

Such were the facts as alleged in the bill of complaint.

The respondents filed three demurrers to the bill.



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THE DEMURRER OF AMOS A. LAWRENCE, THOMAS JEFFERSON COOLIDGE, WILLIAM APPLETON, AND CHARLES H. APPLETON, CERTAIN OF THE DEFENDANTS NAMED IN SAID BILL, AS THEY ARE THE EXECUTORS OF THE WILL OF WILLIAM APPLETON, DECEASED.

These defendants, by protestation not confessing or acknowledging all or any of the matter and things in the said complainant's bill contained, to be true in manner and form, as the same are therein and thereby set forth and alleged, do demur to the said bill, and for causes of demurrer show —

*First.* That the complainant hath not in and by his said bill, made or stated such a case as entitles him in a Court of Equity to any discovery from these defendants, or relief against them as to the matters contained in said bill or any of them.

*Second.* That the complainant, in and by his said bill, in violation of law and the rules of this Court, deprives the defendants of their right of answering under oath.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the said defendants do demur thereto, and pray the judgment of this honorable Court, whether they shall be compelled to make any further answer to said bill, and humbly pray to be hence dismissed.

THE DEMURRER OF WILLIAM APPLETON, CHARLES H. APPLETON, S. E. APPLETON, HETTY S. COOLIDGE, CERTAIN OF THE DEFENDANTS NAMED IN SAID BILL, AS THEY ARE DEVISEES AND LEGATEES UNDER THE WILL OF SAID WILLIAM APPLETON, DECEASED.

These defendants by protestation not confessing or acknowledging all or any of the things in the complainant's bill contained, to be true in manner and form, as the same are therein set forth and alleged, do demur to said bill, and for cause of demurrer show —

*First.* That the complainant hath not, in and by his said bill, made or stated such a case as entitles him in a Court of Equity to any discovery from these defendants, or relief against them as to the matters contained in said bill or any of them.

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*Second.* That the complainant, in and by his said bill, in violation of law and the rules of this court, deprives the defendants of their right of answering under oath.

That it appears, in and by said bill, that it is exhibited against certain persons as executors of the will of William Appleton, deceased, and against these defendants as devisees and legatees under said will, and these defendants, as such devisees and legatees, are improperly joined as parties defendant to said bill.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the said defendants do demur thereto, and pray the judgment of this honorable court, whether they shall be compelled to make any further answer to said bill, and humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

THE DEMURRER OF THOMAS C. AMORY, ONE OF THE DEFENDANTS  
NAMED IN SAID BILL.

This defendant, by protestation not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained to be true in manner and form, as the same are therein and thereby set forth and alleged, doth demur to said bill and for causes of demurrer sheweth —

*First.* That the complainant hath not in and by his said bill made or stated such a case as entitles him in a Court of Equity to any discovery from this defendant or relief against him as to the matters contained in said bill or any of them.

*Second.* That the complainant in and by his said bill, in violation of law and the rules of this court, deprives the defendant of his right of answering under oath.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant doth demur thereto, and prays the judgment of this honorable court, whether he shall be compelled to make any further answer to said bill, and humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

*B. F. Butler, Bumpus and Johnson, for complainant.*

*Sidney Bartlett and C. A. Welch, for respondents.*

CLIFFORD, J. Admitted as the matters well pleaded in the bill of complaint are by the demurrers, the only question is as to their legal effect. Several objections are taken to the right of the complainant to a decree, which will be briefly considered in the following order.

That the claim is within the Statute of Frauds, as the trust was not created or declared by an instrument in writing, signed by the party creating or declaring the same, as it is settled law in this State, that no trust can be created or declared except by such an instrument.

That the claim is barred by the Statute of Limitations, which enacts that all actions of contract, founded upon any contract or liability not under seal, express or implied, with certain exceptions not material to be noticed, shall be commenced within six years next after the cause of action accrues and not afterwards. Mass. Gen. Stat. 777.

That if the claim is not barred by the Statute of Limitations, still, it is barred by the laches of the complainant, and those through whom he claims.

That the bill of complaint fails to show that the complainant is entitled to any relief, because it is not alleged that he acquired a good title from his assignees in bankruptcy.

That the cause of action is barred by the two years' limitation in the bankrupt act, under which the certificate of discharge was obtained.

That the bill of complaint is demurrable, because the complainant attempted to deprive the respondents of their right to answer under oath contrary to the rules and practice of the court existing at the time of filing the bill.

Much discussion of the first question is unnecessary, as it depends at this day entirely upon authority. Undoubtedly the objection would prevail before the Supreme Court of the State, but the rule in equity is different in the Federal courts, as appears by numerous decided cases. Whether oral evidence is admissible for the purpose of showing that a deed, absolute on its face, was intended as a mortgage, was directly presented in the case of *Wyman v. Babcock*, 2 Curt. 398, and the decision of the

court was that such evidence is admissible for that purpose ; and that the statute of frauds is no bar to the admission of the evidence where it is offered to show that such a deed was intended as a mortgage. Twenty years earlier Judge Story decided the question the same way in the case of *Taylor v. Luther*, 2 Sum. 232 ; holding that there is nothing in the Statute of Frauds rendering parol evidence inadmissible to show that an absolute deed was intended as a mortgage, and that the defeasance had been omitted or destroyed by fraud or mistake, or omitted by design upon mutual confidence between the parties. He examined the question upon principle and authority, and gave his reasons for the conclusion, and ten years later in the case of *Jenkins v. Eldredge*, 3 Story 293, he reaffirmed the same position after giving the question a very elaborate consideration. Repeated decisions of the Supreme Court have affirmed the same rule, and it may now be regarded as settled in all the Federal courts. *Conway v. Alexander*, 7 Cran. 238 ; *Spriggs v. Mount Pleasant Bank*, 1 Pet. 201 ; *Morris v. Nixon*, 1 How. 126 ; *Russell v. Southard*, 1 How. 139 ; *Babcock v. Wyman*, 19 How. 299.

Two questions are involved in the second proposition of the defence which, inasmuch as separate demurrers are filed, must be separately considered. 1. Whether the claim of the complainant against the executors of the trustee, for the income and receipts from the sale of the trust property in the lifetime of the trustee, other than the undivided parcel conveyed to the last-named respondent, is or is not barred as assumed by the executors, in their demurrer. 2. Whether the right to redeem the undivided seventh part of the property conveyed by the trustee to the last-named respondent is not also barred by lapse of time, as assumed by that respondent. Before examining those questions, however, it becomes necessary to ascertain more definitely what was the real nature of the original transaction, and for that purpose reference need only be made to the bill of complaint, as all the well-pleaded allegations of the same are admitted by the several demurrers. Schedules of the property, as the complainant alleges, were prepared under the direction of the trustee, it being agreed that he, the complainant, should not part with any of his property until the trustee had made the arrangement

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to pay the \$10,000 to the complainant's creditor, that he made the transfer of his entire property as agreed, it being clearly and distinctly understood between him and the trustee, that the latter was to hold the property simply as security for the \$10,000 to be advanced by the trustee, and that he, the trustee, was to account for the balance as soon as he should be repaid the amount advanced, with interest. Payment was accordingly made to the creditor, the property conveyed to the person designated, and ultimately transferred to the trustee, and the whole transaction perfected as agreed between the complainant and the trustee. Viewed in the light of the decisions of the Federal Courts, the conveyance beyond all doubt, though absolute on its face, was a mortgage. *Wyman v. Babcock*, 2 Curt. 398; *Babcock v. Wyman*, 19 How. 299.

Assume the allegations of both to be correct, and it appears that the trustee was fully paid prior to 1860, and the complainant admits that in that year it came to his knowledge not only that the trustee was fully paid, but that he had in his hands a large balance derived from receipts for the property sold, and the rents and profits of the property which was due to the complainant. Whatever that balance was beyond the sum advanced and interest was a debt or liability not under seal, for which the trustee was responsible to the complainant, and as such constituted a good cause for an action of contract or a suit in equity. *Wyman v. Babcock*, 2 Curt. 401; same case, 19 How. 300. Such actions are barred by the six years' limitation, and the court is of the opinion that the claim against the executors is barred by that limitation. Mass. Gen. Stat. 777. State statutes of limitation and the construction of the same as given by the courts of the State furnish the rule of decision in the Federal Courts in cases where they apply. *Leffingwell v. Warren*, 2 Black. 599. Courts of equity in this State apply the Statute of Limitations in such cases in suits in equity to the same effect as they are applied in actions at law. *Farnham v. Brooks*, 9 Pick. 212; *Dodge v. Ins. Co.*, 12 Gray 71. Rights concealed by the trustee are not subject to such a rule of limitation; but it appears that the complainant knew what his rights were in that regard, twelve

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years before the bill was filed, as well as he knew what they were when the bill was framed, and it is clear that the statute commenced to run, so far as respects the balance in the hands of the trustee, arising from the sale of the property, or from the rents and profits collected beyond the amount advanced, and interest, when the party seeking relief became fully acquainted with the facts, and knew what his rights were in the premises. Perry on Trusts, § 230 ; *Pritchard v. Chandler*, 2 Curt. 488, Angell on Lim. (2d ed.) 176 ; *Kane v. Bloodgood*, 7 Johns. Ch. 90 ; *Hallet v. Collins*, 10 How. 174 ; *Boone v. Cheldt*, 10 Pet. 177 ; *Finney v. Cochran*, 1 Watts. & S. 118. Governed by these considerations, the court is of the opinion that the claim against the executors for the balance in the hands of the trustee for moneys collected in execution of the trust beyond the amount advanced, and interest, is barred by the Statute of Limitations, and having come to that conclusion, it follows that the claim against the devisees of the decedent trustee is without any foundation. Attempt is made to show that the limitation of six years should not be applied in this case, as the trustee died in 1862, but that suggestion cannot relieve the complainant from the bar, as the case is controlled by § 10 of the State limitation act, which in that state of the case only extends the time for bringing the action for the period of two years next after the grant of letters testamentary or of administration. Mass. Gen. Stat. 778. Suggestion is also made that the bill may be sustained against the executors as a mere naked bill of discovery ; but the court is of a different opinion, for two reasons. 1. Because the executors in the further prosecution of the bill against the other respondent of the decree, or for the complainant, are competent witnesses for either party. 2. Because the complainant has been guilty of laches in bringing his bill which may well be taken into the account in determining that question.

Besides the money demand against the executors and devisees of the trustee, the complainant also claims to redeem the mortgaged premises so far as respects the undivided seventh part of the dower estate which the trustee in his lifetime conveyed to the last-named respondent. Evidently that claim rests upon

entirely different principles from the money demand against the other respondents, as the property exists in specie without change, and is held by the grantee of the trustee who made the purchase, and took the conveyance of the property with full knowledge of the trust and of the rights of the complainant under the original arrangement whereby the title of his grantor was acquired. Where an absolute deed is intended as a mortgage, a subsequent purchaser with notice stands in the place of the equitable mortgagee. *Williams v. Thorn*, 11 Page, 459; *Vattier v. Hinds*, 7 Pet. 253; *Everett v. Stone et als*, 3 Story, 446.

Six years is no bar to a claim to redeem a mortgage, nor is the plea of laches any defence to the suit unless it is shown to have extended to a period of twenty years. In the case of a mortgagor coming to redeem, courts of equity have by analogy to the Statute of Limitations, which takes away the right of entry of the plaintiff after twenty years' adverse possession, fixed upon that term as the period after forfeiture and possession taken by the mortgagee, no interest having been paid in the mean time, and no circumstances to account for the neglect appearing, beyond which a right of redemption shall not be favored. *Hughes v. Edwards*, 9 Wheat. 497; *Wyman v. Babcock*, 2 Curt. 398; *Dexter v. Arnold*, 3 Sum. 155; *Elmendorf v. Taylor*, 10 Wheat. 168; 4 Kent. Com. (11th ed.) 187; *Demarest v. Wynkoop*, 3 Johns. Ch. 129. Twenty years without a recognition of the rights of the complainant is not shown in this case. Numerous allegations of the bill contradict any such theory, and show that such a defence in the present state of the pleadings cannot be sustained, as the bill alleges that in 1847 the trustee constantly recognized the rights of the complainant, and told him in substance that it was impossible to say what the receipts would be until his share in his father's estate was all sold, that he also recognized her right to an account, but would not agree definitely to give it, intimating that the property would not amount to more than enough to pay him what he advanced; that in 1850 he agreed to pay him \$600 annually, which has ever since been paid; that in 1856 he paid \$1,600, and \$600 in 1858, which must be understood as a sum in addition to annual payment under



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the prior agreement. Examined in the light of the declarations of the trustee and these several payments, especially the payment at one time of the sum of \$1,600, it is impossible to adopt the theory that the rights of the complainant were not recognized by the trustee within the period covered by those several allegations. Sixteen years only have elapsed since the large payment of \$1,600 was made by the trustee.

Sufficient has already been remarked in disposing of the second objection of the respondent to show that the third objection cannot be sustained, and it is accordingly overruled.

Objection is also made that the allegations of the bill are not sufficient to show that the complainant acquired a good title to the property from his assignees in bankruptcy. All the bill alleges upon the subject is that he was advised to purchase from his assignees in bankruptcy his claim against the trustee, and that he accordingly procured an assignment. Express provision was made by § 9 of the Bankrupt Act of the 19th of August, 1841, that all sales, transfers, and other conveyances of the assignee of the bankrupt's property and rights of property shall be made at such times and in such manner as shall be ordered and appointed by the Court in Bankruptcy, and the Supreme Court of Massachusetts decided in the case of *Osborn v. Batterral*, 4 Cush. 406, that the sale of a bankrupt's real estate under an order of the District Court in which no time or place of sale was fixed by the court, is irregular and void. In general, when a sale is made under a statute power said Shaw, Ch. J., it must appear that the requisition of the statute as conditions precedent to the operation of the power to pass the estate, have been complied with. When the title to real estate is solely through a power, it must, in order to be sustainable, be proved that such power was duly executed. *Cleveland v. Boerum*, 27 Barb. 254. Title was claimed it will be seen in both of those cases under purchases by strangers to the proceedings in bankruptcy, and consequently their claim of title rested solely upon the assumption that the power to sell was duly executed by the assignee. Unlike what occurred in those cases, the purchase in the case before the court was made by the bankrupt, whose title,

in the case of onerous property, where the assignee elects not to take it into possession, is good against all the world, except the assignee or some one to whom he conveyed the property. *Smith v. Gordon*, 6 Law Rep. 317. All the property and rights of property belonging to the bankrupt, unquestionably pass by force of the decree of bankruptcy to the assignee by operation of law, and become vested in him as soon as he is appointed. But though the legal title passes to the assignee, he is not bound, said Judge Ware, to take possession of all the property. Leasehold estates pass to the assignee under the English bankrupt laws, but the assignee is not bound to take the lease and charge the estate with the payment of the rent, as the rent may be greater than the value of the lease, and thus the estate may be burdened instead of being benefited, and in such a case the claim may be abandoned by the assignee. He is not bound in such a case to take the property into his possession, and if he elects not to take the property, it remains in the bankrupt, and no one certainly, except the assignee, has a right to dispute his possession. *Copeland v. Stephens*, 1 Barn. & Ald. 603; *Fowler v. Down*, 1 Bos. & Pul. 157.

Years have elapsed since the proceedings in bankruptcy were closed, and the irresistible conclusion from all the averments of the bill is, that the assignee never elected to take possession of this property, or made any claim whatever upon the trustee for the same. Assignees may refuse to take possession of onerous properties or such as will be a burden instead of a profit, and the clear presumption from the bill as admitted by the demurrer is that the claim against the trustee was regarded in that light by the assignee. Robeson says it has long been a recognized principle of the bankrupt law that the assignees of a bankrupt are not bound to take property of an onerous or unprofitable character, or property which will be a burden instead of a benefit. They are on that subject regarded as being in a very different position from that of the executors of a deceased testator, as the former take the property by operation of law, while the latter claim title through their testator, and are bound to perform his obligations to the extent of his assets.

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Robeson, Bankruptcy, 322. Where the assignee elects not to take the right of the bankrupt and charge the estate with the burden of an uncertain litigation, the right, whatever it is, survives in the bankrupt, and some of the authorities hold that it may be pursued by any creditor not a party to the proceedings in bankruptcy. *Smith v. Gordon*, 6 Law Rep. 317. Persons acting as assignees in such a case are required to elect, within a reasonable time, and the rule is that if they refuse to elect when required to do so, it is deemed an election to reject the estate. *Lawrence v. Knowles*, 5 Bing. N. C. 150; *Carter v. Warne*, 4 C. & P. 336; *Graham v. Van Dieman Land Co.*, 11 Exch. 101; *Ex parte Blandy*, 1 Dea. 286; *Tuck v. Fyson*, 6 Bing. 94. Doubtless the complainant, in such a case, must allege or prove enough to show that the assignee is estopped to set up any right in opposition to his claim, and the court is of the opinion that enough is alleged in this case to satisfy that requirement. Reasonable presumptions are admitted by the demurrer as well as the matters expressly alleged. Pursuant to advice which the complainant received to purchase from his assignees his claim against the trustee, the allegation is that he procured an assignment of the same, which must be understood in this award as a transfer of all the property and estate embraced in the claim which he was advised to purchase by an appropriate legal instrument. Suppose that is so, still the argument is that the allegation is not sufficient, because it is not alleged that the sale was made by the order of the bankrupt court; but the opinion of the court is that such a prior order was not necessary under the circumstances of this case, to give validity to the sale, or if it was, that the reasonable presumption from the allegation of the bill is, that the assignment was made in pursuance of such an order of court. Independent of the assignment, his title, under the circumstances of that case, was good against all the world except the assignee, as the presumption is that the property was regarded as onerous, and that the assignee elected not to take into possession or to prosecute the claim.

The next objection is that the cause of action is barred by two years' limitation in the bankrupt law under which the

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plainant was adjudged a bankrupt. Suffice it to say that the limitation does not apply to the case of an assignee, which is all that need be said upon the subject in the present case. *Banks v. Ogden*, 2 Wall. 69.

It is also objected that the comp'ainant attempted to deprive the respondents of their right to an answer under oath ; but the controlling answer to the objection is, that it can have no such effect, as the waiver amounts to nothing unless the respondents accept it. *Heath v. Erie Railway Co.*, 8 Blatch. 412 ; Story Eq. Plea, § 874. Bill dismissed as to the executors and devisees.

Decree for complainant against Thomas C. Amory.

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ARTHUR PARTON v. LOUIS PRANG.

BEFORE CLIFFORD AND LOWELL, JJ.

The word manuscript in § 9 of the copyright act does not include a picture, and the purchaser of a painting may acquire a title to the same by an oral contract with the lawful owner: the difference between "manuscript" and "painting" defined.

The consent of the author or proprietor in writing, signed in the presence of two credible witnesses, was not necessary under that act to obtain the right to reproduce, or chromo, a picture, provided such consent was fairly and understandingly obtained and for a valuable consideration.

At common law the sole proprietorship of a manuscript is in the author or his assigns before publication, but an unqualified publication, such as is made by printing and offering copies for sale, dedicates the contents to the public, unless the sole right of printing, reprinting, publishing, and vending the same is secured by copyright.

In communicating the contents of his manuscript, the author may prescribe limitations and impose such restrictions as he pleases upon the extent of its use.

THIS was a bill in equity to restrain the respondent from publishing and selling chromo lithographic copies of a painting, representing a view on Claverack Creek, Columbia County, in the State of New York, executed by the complainant and praying for an account.

Parton alleged that he was an artist earning his living by designing, composing, and painting landscapes and other pictures,

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and selling the same ; that he designed from nature and executed the picture of rural scenery described in the bill of complaint, that having so designed and composed the same, he executed a large copy thereof in oils and sold the same, that he did not give or sell to the purchaser the right to copy, print, engrave, lithograph, chromo, or reproduce the picture in any way, or to publish the same in any form ; that the respondent is a lithographer and publisher of chromos so called, that he made or caused to be made a chromo of the picture, and marked or engraved on the face of the chromo, the words and figures : “ Arthur Parton, 1869, Chromo, Lithographed, and published by L. Prang & Co. Entered according to act of Congress in the office of the Librarian of Congress ” ; that he was informed and believed that the respondent had caused an entry of copyright to be made of said chromo under the title “ Close of Day ” and that he claimed the sole right to copy, print, and publish said picture and chromo thereof under said pretended entry of copyright. Wherefore he prayed for an account and for an injunction.

Service was made and the respondent appeared and filed answer. Respondent admitted that the complainant was an artist, that he executed the picture of rural scenery and made a copy thereof in oils as alleged, that the complainant sold the picture to the person named in the bill, but he expressly denied that he sold it to that person for his private collection. He also admitted that he, the respondent, was a lithographer and publisher of chromos, and that he made or caused to be made a chromo of said picture and marked or engraved upon the face of the chromo, the words and figures alleged in the bill, and that he caused an entry of copyright to be made of the chromo, and that he claimed the sole right to copy, print, and publish the said chromo ; that to the time of the sale mentioned in the bill, the complainant retained possession of the picture ; that the picture to that time had been on public exhibition and exposed to the public for sale in his studio in the city of New York ; that the said purchaser there saw and examined the picture, and that the complainant there absolutely and unconditionally sold the same to the purchaser for a valuable consideration in money without any restriction or

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reservation of any kind whatsoever, and that the said picture in pursuance of the said sale was delivered and transferred by the complainant to the purchaser unconditionally and without any reservation; that the purchaser bought the picture for the purpose of re-selling the same; that he immediately sent the picture to a firm in this city engaged in the business of buying and selling pictures and engravings for themselves and others; that the picture was there publicly exposed for sale in their store; that the respondent saw the picture in their store and that they, acting in behalf of the purchaser and owner of the same, sold it to the respondent for a valuable consideration in money; that the sale to the respondent was made absolutely and unconditionally and without any restriction or reservation of any kind whatsoever, and that the picture was then and there delivered and transferred to the respondent unconditionally and without any reservation; that the respondent called upon the complainant and informed him that he had purchased the picture and that he intended to publish it as a chromo; that the complainant made no objection to the proposed publication, but advised the respondent as to the best manner of making the chromo, suggesting that if he change the tint of the background, as the respondent had told the complainant he proposed to do, he would injure the chromo, and advised him to copy the picture exactly as it was at the time of purchase; that the said chromos were made and prepared for the market at great expense of time, trouble, and money, as the complainant well knew, and that the complainant during all the time the respondent was engaged in preparing and making the same, made no objection to his acts and never claimed that he had any right to prevent the publication. Instead of filing the general replication denying the allegations of the answer, the complainant elected to set down the cause for hearing upon bill and answer.

*Thomas W. Clarke and William D. Booth* for complainant.

By sale of an oil painting, does the artist convey his ideal property in the conception of the subject, the combination and effect of its treatment, as well as the particular, tangible, and visible embodiment of that ideal?

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We say, as an undoubted proposition of law, at the same time of the sale of this picture by Parton, at the time of purchase by Prang, at the time of the conversation in March, 1870,—no person could acquire any right to make copies of the picture by engraving or other reproduction, but the first designer or by his express authority in apt words and form. *Curtis on Copy*, 146; *Binns v. Woodruff*, 4 Wash. 48, 51–57; *Pierpont v. Fowle*, 2 W. & M. 23, 46; *Atwill v. Ferrett*, 2 Blatch. 39, 46.

Prang could only register the copyright as Parton's assignee,—as the assignee of the incorporeal contents of Parton's manuscript. This assignment he never had in any form, and no pretence is made of even remotely following the form prescribed by statute, in writing, in presence of two witnesses, even to give him title to the picture itself. At most he claims a verbal license to publish without copyrighting. But he has copyrighted. This is a wrong to us which demands a remedy. His copyright pretends to exclude all the world from that formulation. He claims by the conversation a license simply, a license he might share with others. He claims by his copyright an exclusive right, an assignment by Parton, whose name appears as designer on the picture. In other words, he asserts the absurdity that an equitable non-exclusive license is equivalent to an absolute assignment.

Three cases of infringement of copyright in pictures appear in the English Reports; in each the title was derived from the author after a sale of the picture. *Turner v. Robinson*, 10 Ir. Ch. 121 & 570; *Martin v. Wright*, 6 Sim. 297; *In re Graves*, L. R. 4 Q. B. 715; S. C. 10 B. & Sm. 680; *Ex parte Beal*, L. R. 3 Q. B. 387.

On principle and authority, the following propositions are law, and they are decisive for the plaintiff:

That, by designing a work of art, the artist acquires an exclusive right to multiply the same, which continues till publication in print by his authority, independently of his physical control of the embodiment he has given it.

This right he may assign by deed, like a land deed, but not otherwise.



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The exercise of this right he may license by writing, in presence of two witnesses, but not otherwise.

The transfer of one or more manuscript embodiments of his ideal conveys no part of this right, unless apt *written* words of conveyance are duly set in order, and signed by him.

When there is a Statute of Frauds, there is no presumption of license or laches from any act or thing which is within the terms of the statute.

Neglect to warn a man against a trespass is no license to him to commit it.

No personal prohibition or restrictive notice is necessary to prevent a man from acquiring adverse rights in an unlawful way.

The rights plaintiff once had, and has never assigned, are in him yet, and exclude Prang's claims and title.

*O. S. Knapp, S. Z. Bowman, and H. W. Chaplin*, for respondent.

An author, or artist, has at common law an exclusive property in his unpublished works, in the enjoyment of which equity will protect him. This property continues, however, only until publication. *Jeffreys v. Boosey*, 4 H. L. C. 815; *Turner v. Robinson*, 10 Ir. Ch. 121, and (on Appeal) 510; *Wheaton v. Peters*, 8 Pet. 591; *Keene v. Wheatley*, 9 Am. Law Reg. 33; *Bartlett v. Crittenden*, 5 McLean, 37; 2 Kent's Com. 495.

The painting has been published, the facts of this case bringing it neither within the letter nor within the reason of the established rules which protect unpublished works.

But even if the painting has not been "published," the complainant cannot maintain his bill.

The defendant has succeeded to the complainant's literary property in the picture.

It is only under the U. S. Stat. of 1831 that the complainant can assert the claim (which his bill indicates), that an assignment or license of this kind must be in writing. Except by that act either might be verbal. This statute expressly, and in terms, applies only to "manuscripts."

Copyright Act of 1831, § 13: "Any person or persons who

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shall print or publish any manuscript whatever without the consent of the author," etc.

Now, under no possible definition or use of the language, either in law or literature, can it be held that the word "painting" means "manuscript," or *vice versa*.

CLIFFORD, J. The case now stands in the same posture as if a demurrer had been filed to the bill, which would admit that everything well pleaded in the answer was fully proved. 2 Danl. Chan. Prac. (3d Ed.) 998; *Gettings v. Burch*, 9 Cran. 372; *Leeds v. Marine Ins. Co.*, 2 Wheat. 380; *Brinckerhoff v. Brown*, 7 Johns. Ch. 217; *Dale v. M<sup>r</sup> Evers*, 2 Cow. 118. Viewed in the light of that well-settled rule of practice, it must be assumed as fully proved that the complainant sold the picture for a valuable consideration to the vendor of the respondent, and that the same was delivered by the complainant to the purchaser unconditionally and without any reservation, and that the purchaser from the complainant in like manner sold the picture for a valuable consideration to the respondent, and that he delivered the same to the respondent unconditionally and without any reservation.

Copyright may be granted under the copyright act, to the author of any book, map, chart, or musical composition falling within the classes described in § 1 of the act, if the author is a citizen of the United States or permanently resident therein, and the same privilege is also extended by the same section to any such citizen or permanent resident, who shall invent, design, etch, engrave, work, or cause to be engraved, etched, or worked from his own design any print or engraving; and § 1 also provides that such persons and their executors, administrators, or legal assigns, shall have the sole right and liberty of printing, reprinting, publishing, and vending such book, map, chart, musical composition, print, cut, or engraving for the term of twenty-eight years from the time of recording the title as therein directed. 4 Stat. at Large, 436. Persons printing, publishing, or importing any copy of a book so copyrighted, or causing the same to be printed, published, or imported without the consent of the person legally entitled to the

copyright first had and obtained in writing, signed in presence of two or more credible witnesses, shall forfeit every copy of such to the person legally entitled at the time to the copyright thereof, and the same penalty is imposed upon any person who knowing the same to be so printed or imported, shall publish, sell, or expose to sale any copy of such book without such consent in writing, and that the offender shall also forfeit and pay fifty cents for every such sheet which may be found in his possession, either printed or printing, published, imported, or exposed to sale contrary to the intent of that act. 4 Ibid. 438. Protection is also afforded by § 7 of the act, to any cut or engraving, map, chart, or musical composition so copyrighted; and the provision is that if any person shall within the term engrave, etch or work, sell or copy, or cause to be engraved, etched, worked or sold, or copied, or shall print or import for sale, or cause to be imprinted or imported for sale, any such map, chart, musical composition, print, cut, or engraving, without the consent in writing of the proprietor signed in the presence of two credible witnesses, or knowing the same to be so printed or imported without such consent, shall publish, sell, or expose to sale any such map, chart, musical composition, engraving, cut or print, shall forfeit to the proprietor the plate or plates, on which such map, chart, musical composition, cut or print shall be copied, and also one dollar for every sheet of such map, chart, musical composition, print, cut, or engraving which may be found in his possession, printed or published, or exposed to sale contrary to the true intent and meaning of that act. 4 Ibid. 438. Provision is also made by § 9 of the same act, that any person or persons who shall print or publish any manuscript whatever, without the consent of the author or legal proprietor first obtained as aforesaid, if a citizen of the United States or resident therein, shall be liable to suffer and pay to the author or proprietor all damages occasioned by such injury, to be recovered by a special action on the case, and the Federal courts empowered to grant injunctions to prevent the violation of the rights of authors and inventors, are thereby empowered to grant injunctions in like manner, to restrain such publication of any manuscript. 4 Ibid. 438.

Based upon that section of the copyright act, the proposition of the complainant is, that the respondent did not acquire, by the alleged purchase of the picture, any right whatever to reproduce the picture, or to make a chromo of the same, as he admits in his answer he has done, that he could not acquire such a right by any oral contract of sale, or of sale and delivery, even though the sale and delivery were for a valuable consideration, and were absolute and unconditional; that he could only acquire such a right by the consent of the author or legal proprietor in writing, signed in the presence of two credible witnesses, as required by that section, in order to acquire the right to print or publish a manuscript, which the pleadings show the respondent in that form never obtained. Manuscripts of every kind are embraced in that section, but pictures are not named in the provision, and cannot be regarded as entitled to that special protection, unless it be held that the word manuscript includes pictures, which is affirmed by the complainant and denied by the respondent, and that issue presents the principal question in the case. Standard lexicographers certainly do not concur with the complainant, as for example, Webster treats the word as derived from Latin, *manus*, the hand, and *scribere*, *scriptum*, to write, and as synonymous with *manuscriptum*, meaning literally, something written with the hand, a book or paper written with the hand or a written, as distinguished from a printed, document. On the other hand, the same learned author treats the word picture as derived from Latin *pingere*, *pictum*, to paint, and as synonymous with *pictura*, and defines the word as meaning that which is painted, a likeness drawn in colors, hence, any graphic representation, as of a person, a landscape or a building; and he adopts the language of Bacon, in which he says that pictures and shapes are but secondary objects, showing that in his view the picture presents the objects to the observer as a whole, whereas the manuscript only describes the parts or elements of the object, leaving the mind of the reader to aggregate those parts or elements into an entire figure or whole. Worcester's definition of those two words is substantially the same as the definitions given by Webster. He treats the word manuscript

as derived from the Latin words, *manus*, the hand, and *scriptum*, something written, and defines its meaning as a paper written, a writing of any kind, in contradistinction to printed matter. His definition of the word "picture" also corresponds with that given by the first-named author. He derives it from the Latin word, *pictura*, and defines it as a representation or likeness in colors, a painting or drawing. Bouvier also defines manuscript as a writing, a writing which has never been printed, and refers to the right of an author as secured by the copyright act, and as conceded at common law, but adds that these rights will be considered as abandoned, if the author publishes his manuscript without securing the copyright under the act of Congress. Mere definitions, however, do not portray the difference between a manuscript and a picture as fully or as strikingly as it is seen when the two things are compared and contrasted as means of instruction, or of imparting an idea or description of the object or subject matter of the manuscript or picture. Separate description of each element of the object is required in the manuscript describing the several parts of which it is composed, the nature, material, appearance, size, color, dimensions, use, and everything essential to enable the reader to form an idea of what the object is which is embraced in the description given in the manuscript, all these must be considered and combined by the reader in order that he may be able to form an ideal picture of the object described or the subject-matter of the entire description. His ideal picture may or may not be in accordance with the object actually described in the manuscript, as the object itself is not presented to the senses of the reader. On the contrary, he is left to portray in his own mind the outlines of the object from the written description, and so to combine the same as to suggest an ideal picture of the object described.

Whatever conclusion the reader of the manuscript may form, it is but an ideal picture, made in his own mind from the written description of the object, and necessarily calls into exercise all the creative faculties of the mind. No such operation of the mind is involved, where the picture or painting of the object is presented to the observer, as the object itself in a secondary

form, "drawn in colors," is presented externally to the sense of sight. In the latter case, no ideal of the mind is necessary, as the thing itself is presented physically to the natural eye. Briefly stated, the picture is the thing itself, but the manuscript is only the description of it in language, and leaves the mind of the reader to make the picture, or, in other words, the picture presents, at a glance, all the characteristics of the object exactly as it exists, but the manuscript only enumerates and describes those characteristics one by one, imposing upon the mind of the reader the labor of aggregating the same into a whole and presenting to his perceptions an ideal of the described object. Different communities employ diverse characters for letters and even for phrases, but it can make no difference what the characters are that are employed in describing such an object, not even if they are arbitrary signs, so long as it remains true that the manuscript is a description of the object and not the presentation of the object itself or its portrait, as the manuscript, while it retains that character, is simply the registry of certain thoughts or ideas about a thing and not the exhibition of the thing itself, as in the case of a picture. Unsupported as the proposition of the complainant is, by any legal adjudication, the argument of the respondent is a forcible one that the construction of § 9 of the copyright act must be controlled by the well-established rule that the words of a statute, if of common use, are to be taken in their natural, plain, obvious, and ordinary signification and import, unless it clearly appears from the context or other parts of the enactment, that the words were intended to be applied differently from their ordinary or their legal acceptance. 1 Kent Com. (11 ed.), 462; *Martin v. Hunter's Lessee*, 1 Wheat. 326; *Waller v. Harris*, 20 Wend. 561; *Doane v. Phillips*, 12 Pick. 226. Nothing is shown in the context of the enactment to favor the theory of the complainant, and inasmuch as the usual and ordinary signification and import of the two words is opposed to such a theory, it is difficult to see how it can be adopted without doing violence to the most approved canons of construction. Dwarris on Stat. (2d ed.), 573; Smith Com. §§ 505, 545.

Strong support to the opposite view is derived as a legislative expression, from § 86 of the subsequent and recent copyright act, which, in terms, extends the privilege of copyright to the author, inventor, designer, or proprietor of a painting, drawing, chromo, statue, statuary, and models and designs intended to be perfected as works of the fine arts as well as to the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof, giving to such authors, inventors, designers, and proprietors, the sole liberty of printing, publishing, completing, copying, executing, finishing, and vending the same for the term of years therein mentioned. All persons without the consent of the proprietor of the copyright in writing, signed in the presence of two or more credible witnesses, are forbidden to engrave, etch, work, copy, print, publish, or import any copy of such map or other article, and the provision of § 100 is that if any person shall violate the prohibition as therein expressed, he shall forfeit to the said proprietor all the plates on which the same shall be copied, and every sheet thereof, and in case of a painting, statue, or statuary, he shall also forfeit ten dollars for every copy of the same in his possession. Unquestionably the provision, so far as it relates to a picture, is entirely new, and it will be observed that it does not embrace a manuscript, but § 102 is substantially the same as § 9 in the prior act, and that both alike are in terms confined exclusively to the protection of manuscripts. 16 Stat. at Large, 212, 214. Viewed in the light of these suggestions, the court is of the opinion that the word "manuscript," as used in § 9 of the copyright act, does not include a picture, and that a purchaser of a picture, such as the one described in the bill, may acquire a title to the same by an oral contract with the lawful owner, that the consent of the author or proprietor in writing, signed in the presence of two credible witnesses, was not necessary under that act to obtain the right to reproduce or chromo the same, provided such consent was fairly and understandingly obtained, and for a valuable consideration.

Suppose it is not necessary that the consent of the author



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or proprietor of a picture should be in writing to render the sale valid, still it is contended by the complainant that neither the sale in this case to the vendor of the respondent, nor the purchase of the same by the respondent from the vendee of the complainant, even though the sale and delivery of the picture in each case was absolute and unconditional or both combined, had the effect to transfer to the respondent the right to reproduce or chromo the picture, that in selling and delivering the picture, and subsequently suffering his vendee to sell and deliver the same to the respondent, he only parted with the result of his labor as property, that he did not part with the right to reproduce or chromo-lithograph the picture, that the right to multiply copies of the picture was vested in him as the author and proprietor of the same, and that he still retains that right notwithstanding the sale and delivery by himself and the subsequent purchase by the respondent. Undoubtedly, the author of a book or of an unpublished manuscript, or of any work of art, has at common law and independently of any statute, a property in his work until he publishes it or it is published by his consent or allowance, and that property unquestionably exists in pictures as well as in any other work of art. He has the undisputed right to his manuscript, he may withhold or he may communicate it, and communicating, he may limit the number of persons to whom it shall be imparted, and impose such restrictions as he pleases upon the use of it. He may annex conditions and proceed to enforce them, and for their breach he may claim compensation. *Jeffreys v. Boosey*, 4 H. L. Cas. 815—961; *Millar v. Taylor*, 4 Burr, 2396; *Queensbury v. Shebbeare*, 2 Eden. 329. Numerous other decided cases also affirm the same proposition, that the author of an unpublished manuscript has the exclusive right of property therein, and that he may determine for himself whether the manuscript shall be made public at all, that he may in all cases forbid its publication by another before it has been published by him or by his consent or allowance, that a painter also has at common law the same right before publication to prevent any person from copying it, and that the purchaser and owner of the picture holding the title from the painter

or his assigns, has the same right before publication, to prevent another from multiplying copies of it or reproducing the picture, but the authorities all agree that after publication, that right is lost. *Turner v. Robinson*, 10 Jr. Ch. 121. Same case on appeal. 10 Jr. Ch. 510. *Fisher v. Fold*, 1 Jones Exch. 12; *Wheaton v. Peters* 8 Pet. 591; *Keene v. Wheatley*, 9 Am. L. Reg. 33; *Bartlett v. Crittenden*, 5 McLean, 37. An author, said Hoar, J., in *Keene v. Kimball*, 16 Gray, 549, has at common law a property in his unpublished works, which he may assign, and in the enjoyment of which, equity will protect his assignee as well as himself. This property continues until by publication a right to its use has been conferred upon or dedicated to the public.

Independently of legislation, the sole proprietorship of a manuscript is in the author and his assigns until he publishes it, but an unqualified publication, such as is made by printing and offering copies for sale, dedicates the contents to the public unless the sole right and liberty of printing, reprinting, publishing, and vending the same is secured to the author or proprietor by copyright. But there may be a limited publication by communication of the contents by reading, representation, or restricted private circulation which will not abridge the right of the author any further than necessarily results from the nature and extent of such limited use as he has made or allowed others to make of the manuscript or painting, or, as Lord Brougham said in *Jeffreys v. Boosey*, 4 H. L. Cas. 961, he may withhold or he may communicate it, and communicating, he may prescribe limitation and impose such restrictions as he please as to the extent of its use, which fully justifies the conclusion in *Keene v. Kimball*, that when a literary proprietor has made a publication in any mode not restricted by any condition, other persons acquire unlimited rights of republishing in any mode in which his publication may enable them to exercise such a right. *Keene v. Kimball*, 16 Gray, 550. Assignments of a manuscript are required to be in writing by the copyright act, but enough has been remarked to show that a picture under that act might be transferred by an oral contract, and it is well settled law that

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even copyright is an incident to the ownership of a manuscript, and that it passes at common law with the transfer of a work of art. *Turner v. Robinson*, 10 Jr. Ch. 121. *Power v. Walker*, 3 M. & S. 9. Hence the remark of the court in *Turner v. Robinson*, that it was a strange proposition that the transfer of property should destroy and extinguish that which principally constitutes the value of the thing transferred, meaning not that the right to publish did not pass by the sale, but that the exclusive right of publication which attached to the manuscript was not lost by the transfer. Such a transfer of the manuscript or picture is not a publication of the same unless it was so intended by the parties, but if the sale was an absolute and unconditional one, and the article was absolutely and unconditionally delivered to the purchaser, the whole property in the manuscript or picture passes to the purchaser, including the right of publication, unless the same is protected by copyright, in which case the rule is different. *Baker v. Taylor*, 2 Blatch. 82; *Ryan v. Goodwin*, 3 Sum. 518; *Wood v. Zimmer*, Holt N. P. 60; *Pennock v. Dialogue*, 2 Pet. 14.

Personal property is transferable by sale and delivery, and there is no distinction in that respect, independent of statute, between literary property and property of any other description. Owners of personal property have the right to sell and transfer the same as inseparable incidents of the property and the author or proprietor of a manuscript or picture possesses that right as fully and to the same extent as the owner of any other personal property; the same being incident to the ownership. Sales may be absolute or conditional, and they may be with or without qualifications, limitations, and restrictions, and the rules of law applicable in such cases to other personal property must be applied in determining the real character of a sale of literary property. Proper attention to these considerations will furnish the true explanation of many, if not all the cases referred to by the complainant, which are supposed to support the second proposition for which he contends. *Prince Albert v. Strange*, 1 Hall & Twells. 1; *Queensbury v. Shebbeare*, 2 Eden. 329; *Bishop v. Griffin*, 16 Sum. 196; *Steven v. Cady*, 14 How.

528 ; *Stevens v. Gladding*, 17 How. 447 ; *Abernethy v. Hutchinson*, 1 Hall & Twells. 28.

Beyond doubt, the right of first publication is vested in the author ; but he may sell and assign the entire property to another, and if he does so his assignee takes the entire property, and it is a great mistake to suppose that any act of Congress, at the date of the sales of the picture in this case, required that such an assignment should be in writing ; and the pleadings show that the sale and delivery in each case were absolute and unconditional, and without any qualification, limitation, or restriction, showing that the entire property was transferred from the complainant and became vested in the respondent. *Sims v. Marryatt*, 17 Ad. & Ell. 281 ; *Adderly v. Dixon*, 1 Sim. & S. 607. Confirmation of that view, if any be needed beyond what appears in the express allegations of the answer to that effect, is also found in the further allegation that the respondent called upon the complainant immediately after the sale and delivery to him, and informed the complainant that he intended to publish the picture as a chromo, and that the complainant made no objection to the proposed publication, showing that the complainant as well as the respondent understood that the entire property of the picture was vested in the respondent. It is insisted by the respondent that the acts and declarations of the complainant on that occasion, as more fully set forth in the answer, estop the complainant from making any such claim as that set up in the bill ; but it is unnecessary to decide that question, as the court is of the opinion that those acts and declarations amount to a practical affirmance of the contract of sale and delivery of the entire property of the picture, as understood and claimed by the respondent. *Freeman et al. v. Cooke*, 6 D. & L. 187 ; *Boucicault v. Fox*, 5 Blatch. 100 ; Bigelow on Estoppel, 475. Neither a conditional sale nor any unfairness is shown, and as neither exists in the case, it must be held that the complainant parted with the entire property in the picture. *Pope v. Curl*, 2 Atk. 142 ; *Thompson v. Stanhope*, Amb. 737 ; *Mayall v. Higbey*, 1 H. & C. 147 ; *Jones v. Thorre*, 1 N. Y. Obs. 408 ; *Dalglish v. Jarvie*, 2 McN. & G. 231 ; *Martin v. Wright*,

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6 Sim. 297; *Read v. Conquest*, 9 C. B. N. S. 755. Unfairness is not pretended in this case, and inasmuch as the sale and delivery were in their terms absolute and unconditional and without any reservation, restriction, or qualification of any kind, the court is of the opinion that complainant is not entitled to relief.

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SUMNER U. SHERMAN, in Error, v. OSMER A. BINGHAM *et al.*

Under the act of March 2d, 1867, an assignee in bankruptcy of a person declared a bankrupt in one district, may maintain an action to recover moneys paid the defendants residents of another district, in violation of the Bankrupt Act, in the District Court of such district, and such District Court in the district where such defendants reside, has jurisdiction of the subject-matter and the parties.

The whole tenor of the present Bankrupt Act shows that Congress intended to provide for the complete administration of the bankrupt system in the Federal Courts and through the instrumentality of Federal officers.

By § 1 of the Bankrupt Act, the several district courts of the United States are constituted courts of bankruptcy, and the provision is, that they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and that they might hear and adjudicate upon the same, according to the provisions of the Bankrupt Act. On the 21st of March, 1871, the plaintiff, as assignee in bankruptcy of the estate of the bankrupts named in the record, brought an action of assumpsit against the defendants to recover back certain moneys, which he alleges were paid to them by the bankrupts, in violation of the Bankrupt Act. Both the bankrupts were resident in the County of Providence, and State of Rhode Island, and were doing business in that County under the name and style of Reynolds and Bartlett, and the record showed that the petition in bankruptcy was filed in the District Court for that district, and that all the proceedings took place in the court where the petition was filed. Service was made, and the defendants appeared and pleaded as follows: "That the proceedings wherein the plaintiff alleges that he became, and is assignee, as aforesaid, were all instituted in

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the District Court of the United States for the district of Rhode Island, and not in this district, and that the District Court here hath no jurisdiction over the subject-matter, or the parties to the suit." The parties were heard, and the court entered judgment for the defendants, and thereupon the plaintiff sued out a writ of error and removed the cause into this court.

*E. P. Brown* for the plaintiff in error.

*C. T. and T. H. Russel* and *H. W. Suter* for defendants.

CLIFFORD, J. Two propositions are submitted by the defendants in support of the theory assumed in the court below that the District Courts have no jurisdiction in such a case.

That no jurisdiction is conferred in such a case, by § 9 of the Judiciary Act, or by any other act of Congress than the Bankrupt Act giving jurisdiction to the District Courts in common law suits between party and party, which may well be admitted, as nothing of the kind is pretended by the plaintiff.

That the Bankrupt Act does not confer jurisdiction in such a case, in a district other than that where the proceedings in bankruptcy are pending, which is the question presented by the plea to the jurisdiction of the District Court.

District Courts have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and the argument is, that inasmuch as the jurisdiction must be exercised in the district for which the district judge is appointed, the District Court, sitting as a court of bankruptcy, cannot exercise jurisdiction in any case except in the district where the bankruptcy proceedings are pending; but § 1 of the Bankrupt Act contains no such limitation, nor does it contain any words which, properly considered, justify any such conclusion.

General superintendence and jurisdiction of all cases and questions under the act are conferred upon the several circuit courts, except where special provision is otherwise made by the first clause of § 2 of the act; but the subsequent language of the same clause makes it clear that the jurisdiction conferred by that clause can only be exercised within, and for the district "where the proceedings in bankruptcy shall be pending." No such limitation, however, is found in the clause of § 1 conferring jurisdiction upon

the District Courts as courts of bankruptcy. Judges of the District Courts must sit undoubtedly in the districts for which they are respectively appointed, and no doubt is entertained that the process of the court in proceedings in bankruptcy cases, is restricted to the territorial limits of the district; but the language of § 1 of the Bankrupt Act describing the jurisdiction of the District Courts, sitting as courts of bankruptcy, is, that they shall have original jurisdiction in their respective districts "in all matters and proceedings in bankruptcy," showing unquestionably that they can only sit, and exercise jurisdiction in their own districts; but the limitation that the proceedings in bankruptcy must in all cases be pending in that district, is not found in that clause of § 1 of the act. On the contrary, the same section provides that the jurisdiction conferred, that is, the jurisdiction of the several district courts, shall extend to all cases and controversies arising between the bankrupt and any creditor, or creditors, who shall claim any debt or demand under the bankruptcy act, and also to the collection of all the assets of the bankrupt to the ascertainment and liquidation of the liens, and other specific claims thereon, to the adjustment of the various priorities and conflicting interests of all parties, and to the marshalling and disposition of all the different funds and assets, so as to secure the rights of all parties, and the due distribution of the assets among all the creditors, and to all acts, matters, and things to be done under, and in virtue of the bankruptcy.

Unless the assignee can collect what is due to the bankrupt he can never perform the duty assigned to him as the representative of the bankrupt, and § 1 of the act expressly provides that the jurisdiction of the District Courts shall extend to the collection of all the assets of the bankrupt, and to all acts, matters, and things to be done under, and in virtue of the bankruptcy. Nothing of greater importance is required to be done under and in virtue of the bankruptcy than the collection of the assets belonging to the estate of the bankrupt. Bankrupts, as all experience shows, have debts due them in districts other than the one where the proceedings against them are instituted, and



§ 14 of the act provides that all "debts due" to the bankrupt, as well as all his rights of action for property, or estate, real or personal, and for any cause of action which the bankrupt had against any person, arising from contract, or from the unlawful taking, detention, or injury to property of the bankrupt, etc., shall, in virtue of the adjudication of the bankruptcy and the appointment of the assignee be at once vested in such assignee. Power and authority to sell, manage, dispose of, sue for, and recover, or defend the same, are also vested in the assignee by virtue of the same adjudication and appointment. 14 Ibid. 523. He is empowered to demand and receive from any and all persons holding the same, all the estate assigned, or intended to be assigned, under the provisions of the Bankrupt Act, and shall have the like remedy to recover all said estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. Assignees, if they request it, are to be admitted to prosecute actions pending in the name of the bankrupt at the time he was adjudged to be such, no matter where the action was pending, if it was an action for the recovery of a debt, or other thing, which might, or ought to pass to the assignee by the assignment. They are to be chosen by the creditors, but the provision is, that as soon as the assignee is appointed and qualified, the judge, or where there is no opposing interest the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt. Such assignment being made it becomes the duty of the assignee within six months to cause the same to be recorded in every registry of deeds, or other office in the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded, and it is enacted, that such records, or a duly certified copy of the same, shall be evidence thereof in all courts, and that in suits prosecuted by the assignee, a certified copy of the assignment made to him by the judge or register, shall be conclusive evidence of his right to sue. His duty to sue as well as his right, if necessary to collect the assets of the bankrupt, is shown beyond all doubt: but it is as clear as anything in judi-

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cial investigation can be, that he cannot perform that duty, nor exercise that right in the Federal Courts, unless the jurisdiction in this case is sustained, and it is not pretended by either party that the process of the District Court in such a case extends beyond the limits of the district.

Debts due to the bankrupt from persons resident in the district where proceedings are pending, it is conceded, may be collected by suit in such District Court, which proves to a demonstration that it is the subject-matter, and not the citizenship of the parties, which gives the jurisdiction, as in that case it must be understood that both parties are citizens of the same State.

Power to establish uniform laws on the subject of bankruptcy is conferred upon Congress by the Constitution, and it is quite clear that the Bankrupt Act and all its provisions were framed in pursuance to that authority. Whatever jurisdiction, therefore, the District Courts have in actions brought by assignees to collect the assets of the bankrupt, or to recover any of his rights of property, real or personal, is derived from the Bankrupt Act, passed in pursuance of that authority. Comprehensive and explicit as that clause of the Constitution is, it is not possible to doubt that it empowers Congress, not only to establish uniform laws on the subject of bankruptcies throughout the United States, but also to commit the execution of the system to such courts of the United States as Congress shall see fit, and to prescribe such modes of procedure and means of administering the system as Congress in their discretion shall deem best suited to carry it into successful operation. Congress accordingly passed the existing Bankrupt Act, and conferred the exclusive, original jurisdiction, except in a limited class of cases, upon the District Courts, giving the Circuit Courts, within and for the district where the proceedings in bankruptcy shall be pending, except where special provision is otherwise made, the power to revise all such cases and questions arising under the act, as in a court of equity, in term time or in vacation.

Original jurisdiction is also conferred upon the Circuit Courts, concurrent with the District Courts of the same district, in all suits at law, or in equity, which may be brought by the assignee

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in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property, or rights of property of said bankrupt, transferable to, or vested in, such assignee. District Courts, in the exercise of their exclusive original jurisdiction, may act in administrative matters, or matters of mere discretion, as well in vacation as in term time. And a judge, sitting at chambers, in such matters has the same powers and jurisdiction as when sitting in court, and all such adjudications, orders, and decrees may be revised in the Circuit Court, within and for the district where the proceedings in bankruptcy shall be pending under the first clause of § 2 of the same act. *Morgan v. Thornhill*, 11 Wall. 72; *Hall v. Allen*, 12 Wall. 453.

Jurisdiction is also conferred upon the District Courts, in actions at law, or suits in equity to collect the "assets of the bankrupt," or as the enactment is expressed in § 14 of the act, "to sue for and recover" all rights in equity, choses in action, patents and patent rights and copyrights, all debts due to the bankrupt, or any person for his use, and all property real and personal, and all damages for injuries to the property of the bankrupt, and also to redeem all his property or estate as fully as the bankrupt might or could have done, if no assignment had been made. Actions at law or suits in equity, under those clauses, cannot be heard and determined by the District Court at chambers nor in vacation, nor can any judgment or decree entered by the District Court, in such a case, be revised by the Circuit Court, under the first clause of § 2 of the Bankrupt Act. *Knight v. Cheney*, 5 N. B. R. 305-309; *Smith v. Mason*, 6 N. B. R. 7.

Writs of error may be allowed in such cases to the Circuit Courts, in actions at law, and appeals may be taken to the same courts in all cases in equity, when the debt or damages claimed amount to more than \$500, and the like remedy is given to the losing party, in the Circuit Court, to remove the cause into the Supreme Court, where the matter in dispute shall exceed \$2,000. Judgments or decrees in the District Courts, where the debt or damage does not amount to more than \$500, are final in that court,

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and judgments and decrees in such cases in the Circuit Courts, where the matter in dispute shall not exceed \$2,000 are final in the Circuit Court, where the judgment or decree was rendered. The execution of the Bankrupt Act, to the extent already described, is committed to the Federal Courts organized under the Judiciary Act. Provision is also made, by § 3 of the act, for the appointment in each Congressional District, of one or more registers in bankruptcy, to assist the judge of the District Court in the performance of his duties under the act, showing that Congress intended to provide every necessary instrumentality to execute the system, in all its details. Important duties, under the act, also devolve upon the marshal of the United States, and the settled practice is, that oaths must be administered by the court, clerk, or register, or a commissioner of the Circuit Court, and that neither a justice of the peace, nor any other State officer, not authorized to administer oaths in the Federal Courts, by an act of Congress, can administer oaths in such proceedings. Viewed in the light of these suggestions as the question must be, the court is of the opinion that Congress, in framing the Bankrupt Act, intended to provide Federal instrumentalities for its complete execution, and such as are sufficient to carry it into full effect. State courts may doubtless exercise concurrent jurisdiction with the Circuit and District Courts in certain cases growing out of proceedings in bankruptcy; but Congress, in the judgment of the court, intended to provide the means for the execution of the law, in all cases, even though the State courts should refuse to exercise jurisdiction. Confirmation of that view is derived from § 32 of the act, which provides that all proof of debts against the estate of the bankrupt, by or in behalf of creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court, in said district, and by or in behalf of non-resident creditors, before any register in bankruptcy, in the judicial district, where such creditors or either of them reside, or before any commissioner of the Circuit Court authorized to administer oaths in any district tribunals of Federal creation. Methods are also provided for the execution of the bank-

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rupt law in the District of Columbia, and in all the several Territories of the United States, and the provision is, that in judicial districts not within any organized circuit of the United States, the power and jurisdiction of a Circuit Court in bankruptcy, may be exercised by the district judge, showing that the intention of Congress was that the jurisdiction created by that act should everywhere, within the territorial limits of the United States, be exercised, and the law be administered by Federal tribunals and officers appointed under Federal authority.

Unless the case before the court constitutes an exception, no act required to be done in execution of the bankrupt law can be named or pointed out which may not be done in the designated Federal tribunal or by the Federal officer designated in the bankrupt law. Enough has already been remarked to show that Congress never could have intended to constitute any such exception, which sufficiently appears from the fact that § 1 of the act contains no language to support any such theory. And also from the fact, that such a limitation applied to the Circuit Court is plainly expressed in the first clause of § 2 of the act, giving those courts general superintendence and jurisdiction in all cases and questions arising under the Bankrupt Act, except when special provision is otherwise made. Subsequently the same limitation was also incorporated into the third clause of § 2, by which jurisdiction is given to the Circuit Courts, concurrent with the District Courts of the same district, in suits at law or in equity brought by the assignee against any person claiming an adverse interest, or by such person against such assignee in the cases therein described. Such jurisdiction is concurrent with the District Court of the same district which means that the plaintiff may bring his suit either in the Circuit or the District Court of the district, at his election, plainly showing that Congress, when they mean to enact a limitation, find no difficulty in selecting appropriate words to express such an intention. Beyond doubt Congress, in enacting the bankrupt law, intended to make it uniform throughout the United States, and in order to secure such uniformity Congress obviously intended to create or to designate tribunals and officers to exe-

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cute all its provisions ; but it is clear that if the supposed defect of jurisdiction exists in the District Courts, that the act neither creates nor designates any tribunal which is obliged to exercise any such jurisdiction. Suppose it be conceded that such a suit may be prosecuted in a State court, the concession will not give any support to the theory of the defendant, as it is settled constitutional law that Congress cannot compel a State court to entertain jurisdiction under an act of Congress in any case ; that it is optional with them, in all cases, whether to entertain any jurisdiction or not ; that they are left to consult their own duty from their own State authority, and some courts have held that Congress cannot confer any jurisdiction upon a State court in a matter within the exclusive jurisdiction of the Federal government. *Martin v. Hunter*, 1 Wheat. 330, 331 ; *McLean v. Lafayette Bank*, 3 McLean, 191 ; *Stearns v. United States*, 2 Paine, 311.

Criminal jurisdiction cannot be conferred upon State courts, by an act of Congress, and it seems to be everywhere admitted, that they are not bound to exercise jurisdiction, even in civil cases, but that they may decline to do so if they see fit, or if the laws of the State forbid it. *Stearns v. United States*, 2 Paine, 309 ; *Houston v. Moore*, 5 Wheat. 27 ; 1 Kent Com. (11th ed.) 399 – 400 ; 2 Story on Con. 3d ed.) §§ 1752 – 55.

Grant, that the theory of the defendant is correct, and it follows that the bankrupt law cannot be executed, except by the consent of the several States, and it is quite clear that the State courts cannot exercise jurisdiction in such cases, if they are forbidden to do so by their respective State legislatures. Strong support to the theory, that the jurisdiction exists, is also derived from a comparison of the language of § 6 of the prior act, with the language of § 1 of the existing act, in view of the authoritative construction, which was given to the provision in the prior act. Provision was made by § 6 of the prior act, “that the District Courts in every district shall have jurisdiction in all cases and proceedings in bankruptcy, arising under the act.” . . . . And that the jurisdiction shall extend “to all cases and controversies” in bank-

ruptcy, arising between the bankrupt and any creditor or creditors and the assignee of the estate, whether in office or removed, to all cases between such assignee, and the bankrupt, and to all acts, matters, and things to be done, under and in virtue of the bankruptcy," etc. 5 Stat. at Large, 545.

All must admit that no words are contained in the prior law to support the theory, that the jurisdiction was intended to be conferred, which are not contained in § 1 of the existing act. Nothing of the kind is suggested, nor could it be, as the comparison of the two provisions shows that the language of the existing act affords stronger evidence that Congress intended to confer the jurisdiction, than anything found in the prior act, as the clause enumerating certain matters cognizable in the District Courts contains the words, "that the jurisdiction shall extend to the collection of the assets of the bankrupt," which words are not contained in the corresponding provision in the prior law. Judge Story decided in *Ex parte Martin*, 5 Law Rep. 159, that the language of the prior law was not; in terms or by fair implication, necessarily confined to cases of bankruptcy originally instituted, and pending in the particular District Court, where the relief is sought. On the contrary, it is not unnatural to presume, said the same Judge, that in cases originally instituted and pending in one district, an assignee may apply to reach persons and property situate in other districts, and require auxiliary proceedings therein to perfect and accomplish the objects of the act; the intention of Congress was, that the District Courts in every district should be mutually auxiliary to each other for such purposes and proceedings. Speaking of the language of the act, the same judge remarked, it is sufficiently comprehensive to cover such cases, adding that he could perceive no solid ground of objection to such an interpretation of the provision. Relief cannot be granted by the District Court of the district, where the bankrupt proceedings are pending, as the process of that court is inoperative beyond the territorial limits of the district, and it is clear that the State courts are not obliged to entertain jurisdiction in any such case. Refusal to pay a just debt, is a wrong for which the assignee ought to have a remedy



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not dependent upon the option of a State Court, but it is clear that the plaintiff has none such in this case, unless the jurisdiction of the District Court in this district is sustained. States in providing their own judicial tribunals have a right to limit, control, and restrict their judicial functions and jurisdiction, according to their own mere pleasure. They may, as Judge Story remarked in a later case, refuse to allow suits to be brought there under the laws of the United States, for any one of the reasons mentioned by the learned Judge, or for many other reasons which might be suggested. *Mitchell v. Great Works Co.* 2 Story, 656.

Bankrupt Courts throughout the United States, it is believed, adopted those views in all their adjudications made subsequent to that decision, in administering the prior bankrupt law. Direct adjudication to that effect is found in the case of *Moore v. Jones et al.*, 23 Vt. 746, in which the opinion was given by the learned District Judge of the Vermont District. The Equity jurisdiction of the District Courts of the United States, under the bankrupt act, said Prentiss J., is not confined to cases of bankruptcy originally arising and pending in the particular court, where the relief is sought, as cases of bankruptcy originally instituted and pending in one district, may apply to reach persons and property situate in other districts, and as they may require auxiliary proceedings in such districts, to perfect and accomplish the objects of the act, it is held, that the intention of Congress was, that the District Courts in every district should be mutually auxiliary to each other for such purposes and proceedings. *Goodall v. Tuttle*, 4 Chicago Legal News, 473.

Contrary decisions have been made by several of the District Judges, and in one case by a Circuit Judge, but it must suffice to remark in respect to those decisions, that the reasons assigned in support of the conclusions, do not appear to be satisfactory. They assume what is not correct, that the jurisdiction of the District Courts is confined to the district in which the proceedings shall be pending. Such an expression is contained in the first clause of § 2 of the act, which describes the revisory power of the Circuit Courts, but it is not

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contained at all in § 1 of the act, and Courts of Justice have no right to enact any such amendment. Suits to collect the assets of the bankrupt, except to a very limited extent, cannot be maintained in the Circuit Courts, so that if the theory of the defendant is correct, there is no right under the bankrupt act to maintain suits for such a purpose in any Federal Court in a case where the debtor resides out of the district in which the proceedings in bankruptcy are pending, which cannot be admitted as the whole tenor of the Bankrupt Act, shows that Congress intended to provide for the complete administration of the bankrupt system in the Federal Courts, and through the instrumentality of federal officers. Confirmation of that view is also derived from the fact that Congress borrowed the language employed to describe the jurisdiction of the District Courts from the corresponding section in the prior law, which had uniformly been so construed by the Federal Courts, and also from the fact that it is settled law that Congress cannot compel the State Courts to entertain such jurisdiction in favor of an assignee for the collection of the assets of the bankrupt.

These and many other considerations which might be adduced go to show, that the cases which deny the jurisdiction of the District Court in such a case, are not well decided.

Judgment reversed.

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## MAINE DISTRICT.

APRIL TERM, 1873.

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JOHN W. JONES *et als.* v. R. K. SEWALL, Administrator of HENRY CLARK.

Although an inventor has obtained a patent for a process he may have another for the product.

There cannot be more than one valid patent for an invention, nor can the grantee of a patent sustain an action upon another patent for the same invention, issued afterward.

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Jones *et als.* v. Sewall.

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Separate patents for separate and distinct parts of the same invention are nevertheless valid.

A patent is *prima facie* evidence that the alleged inventor had made the invention when the specification was filed.

If the alleged inventor or patentee wish to show that the invention was made by the inventor previous to the filing of the application, it must be proved, as against another patent, that it had been reduced to practice as an operative invention.

Previous use or knowledge of an invention abroad is no defence against a patent, unless such invention was described in some printed publication so clearly as to enable others to put it in practice.

The use of an invention by the author thereof, for the purposes of experiment, though continued for more than two years, will not deprive him of his right to a patent. Neither will the sale of it for two years by others without his consent.

Where an invention has, through the acts of the inventor, gone into public use beyond his control, his right is forfeited beyond recall.

The defence that the patentee had allowed his invention to be in public use or on sale for more than two years before he applied for a patent, is distinct from the defence that he had abandoned it to the public, and should not be blended with it in the same pleading.

Unavoidable delay, while an application for a patent is pending, is no ground for imputing abandonment.

Mere forbearance to apply for a patent while the inventor is experimenting upon his invention, and perfecting it, testing its value, or dealing with any of its necessary incidents, practical knowledge of which is requisite to its usefulness, afford no ground for presuming abandonment.

A patent for preserving green corn by severing the kernels from the cob so that the juices will be liberated, and the toughening of the kernels by cooking prevented, and then boiling the kernels and juices together in sealed cans, after the juices have exuded from the kernels, is valid, although a patent has been previously granted abroad for preserving certain vegetables, not including the mention of corn, or the severing of the kernels thereof, by boiling them in hermetically sealed vessels.

BILL in equity to restrain the defendant from preserving green corn according to the specifications of letters-patent numbered 34,928, 35,274, 35,346, 36,326.

While the cause was pending the defendant died and his administrator, R. K. Sewall, appeared in the place of the original defendant, all other necessary facts appear in the opinion.

*William Henry Clifford*, for complainants.

*R. K. Sewall, A. A. Strout, and Bradbury and Bradbury*, for respondents.

The patent of 1862 as issued, is, for a new article of manufacture, prepared by the process therein described, and notwithstanding Isaac Winslow, in his affirmation made February 18, 1862, says that the original papers are lost, and that specification filed by him of that date is substantially the same as the one filed

in 1853, yet the examination of the application of 1853 and the subsequent correspondence shows beyond doubt that this statement was erroneous, so far as the manufactured article was concerned, and that if Isaac Winslow was really the first inventor of "Indian corn preserved green" (which we deny), that twenty years had elapsed before he made application to protect his invention, which in the mean time had become public property, using that term in its widest significance.

The patent of April 8, 1862, p. 5, contains a description, not only of the new manufacture sought to be protected, but also of the method or process used in producing it. An analysis of this invention, as claimed and described in the patent and specification forming a part of it, shows its elements to be

Green Indian corn in its natural state and in the ear. This was not new.

Removing the kernel from the cob by a curved and gauged knife or other suitable means.

Packing these kernels of uncooked corn in cans hermetically sealed, and exposing these cans to steam or boiling heat for about one hour and a half longer.

Puncturing the cans and immediately resealing the same while hot.

Exposing the cans to the same heat, for about two hours and a half.

The new and useful manufacture, then, was green Indian corn cooked in hermetically sealed cans which were punctured and resealed during the process of cooking.

This patent was issued April 8, 1862, and had seventeen years to run.

Now, it will be perceived that the patent of April 8, 1862, is for a new article of manufacture only, and does not include the process. It is true, that in the specification, Winslow recommends a "method," but he does not claim it as a part of his invention. That he did not intend to claim the process is apparent from the fact that the language of the patent does not cover it, and that Winslow proceeded to take out, at a subsequent date, three other patents covering the process and distinct parts of the process.

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If it is said that the process is covered by the patent of April 8, 1862, then there was an attempt on the part of Jones, as the assignee of Winslow, to extend the life of his invention, described in the patent of April 8, 1862, by taking out letters-patent for the same process at subsequent dates, each having seventeen years to run.

Now, neither of the patents embracing the process or component parts of the process, and issued subsequent to April 8, 1862, contain any reference or are in any way connected with the application made and rejected in 1853, and, inasmuch as the application of 1853 contained no allusion to Winslow's claim to obtain a patent for a new manufacture, it follows that in this hearing all the patents are to be considered as issued upon an application first made in 1862, and the application of 1853 is of no consequence, and is to be disregarded so far as the claims made by complainant in regard to it are concerned.

As to the patent for a new manufacture.

Examining carefully the claim of the complainant in this particular, and considering the state of the art at the time, we respectfully submit that there is such a palpable want of invention in the plaintiff's claim, that even if he had been the first inventor he would not have been entitled to a patent.

Winslow's alleged new manufacture affords no scope for a patent, because it is destitute of ingenuity, skill, or invention. *Blandy v. Griffith*, 3 Fish. 616.

Judge Lowell, in his opinion in the case of John W. Jones *et al.* and William Hodges *et al.*, involving the very patents upon which the bill is brought, says:

"The ground on which I feel bound to refuse the injunction at this time is, that I entertain strong doubts whether, in view of what had been done before, there was any scope for a patent to Winslow. The English patent of Durand, enrolled in 1810, No. 3370, is for a method of preserving animal food, vegetable food, and other perishable articles, and describes the Winslow process exactly, excepting the 'venting,' as it is called. Durand is very full in his directions for putting the articles into bottles or other vessels, sealing the vessels, putting them into a boiler,

filling the boiler with water and boiling it for a longer or shorter time, according to the nature of the article and other circumstances. He shows that the cooking may be done by a steam bath, or by hot air, etc.

These patents are void for want of novelty. They are the application of old processes to a new material, — the double use of processes well-known, — the new use of an old invention. *Bray v. Hartshorn*, 1 Cliff. 540 ; *Bean v. Smallwood*, 2 Story, 408 ; *Phillips v. Page*, 24 How. 167 ; *Hotchkiss et al. v. Greenwood*, 11 How. 266 ; *Hovey v. Stevens*, 1 Wood. & M. 290 ; Curtis on Pat. (3d ed.), §§ 51–55, 66 ; *Brunton v. Hawkes*, 1 B. & Ald. 549, 550 ; *Losh v. Hague*, 1 Webs. Pat. Cases. 207 ; *Whitney et al. v. Emmett et al.*, 1 Bald. 303.

The present is like the case of the rocking-chair in *Bean v. Smallwood* ; the door-knobs in *Hotchkiss v. Greenwood* ; the anchor in *Brunton v. Hawkes* ; or the carriage wheels in *Losh v. Hague*.

An old contrivance applied to a new object is not patentable.

Winslow, the patentee, publicly used the invention patented by him, or allowed it to be used for profit more than two years prior to the date of his rejected application for the original patent, and so dedicated it to public use. *Shaw v. Cooper*, 7 Pet. Pierce bought of Nathan Winslow in 1848, 1849, 1850, 1851. Provost found the Winslow corn in the market in 1848 or 1849. George Burnham says Winslow's corn was in the market as early as 1848. Testimony of complainant's witness, Jeremiah Ford, renders this conclusive. P. 277, Cross Int. 6 ; Record, p. 55 ; Ans. to Int. 30 ; J. W. Jones.

The relations of Nathan Winslow to Isaac were such that there can be no doubt that he knew that Nathan Winslow had sold the preserved corn for profit more than two years prior to March 5, 1853, if he had not actually made sales himself. They were brothers. Nathan furnished the funds for the business. Nathan put up the corn under the direction of Isaac. Nathan was Isaac's agent, and Isaac was bound by his acts. *Bedford v. Hunt*, 1 Mas. 302.

The laches of the patentee render the patent void and amount to an abandonment.

If an inventor, after his invention is perfected, unreasonably delays his application for a patent, and others, before such application is made, actually perfect and apply to practical use the same invention, and give the knowledge thereof to the public, and the former, after that knowledge of such subsequent use and invention fails to make objection, and apply without unreasonable delay for a patent, he cannot sustain the patent he may afterward obtain, because he has failed to give the public that consideration for the grant of exclusive privileges, upon which all valid patents are based. *Ransom v. Mayor of New York*, 1 Fish. 254.

Abandonment may be inferred from an acquiescence in the use of his invention by others, or a neglect to assert his claim by suit or otherwise. *Ibid.* There must be reasonable diligence on the part of the inventor to perfect and patent his invention. *Cox v. Griggs*, 2 Fish. 174; *Goodyear v. Hills*, 3 Fish. 135; *Bacon v. Hills*, 3 Fish. 135. *Blandy v. Griffith*, 3 Fish. 609. No appeal was taken by Winslow, after his first application was rejected. No new application was made for the period of nine years. Meanwhile, preserved corn went into general use.

The same invention substantially had been patented in foreign countries long before the alleged invention of Winslow. By Durand in 1810. The Durand process is substantially like Winslow's, producing substantially the same result. *Cahoon v. Ring*, 1 Cliff. 592.

The patentee is not obliged to state everything to which his invention is applicable in order to be protected in his right to the exclusive enjoyment of the invention. *Pike v. Potter*, 3 Fish. 55.

The sealing hermetically, puncturing, and resealing of Winslow's process, and the leaving a small aperture until the heat takes effect in Durand's process, produce substantially the same result. The process of Durand was not a new process, and he, in his specification, speaks of the invention as "communicated to him by a certain foreigner, residing abroad, of the method of preserving animal food, vegetable food, and other perishable articles."

Vegetable food includes green corn. The Durand patent speci-



fies the putting the "*vegetable substances*" into the cans in "a raw or crude state." If it be said that Durand's process contemplated the cooking the corn on the cob, the reply is, such is not the meaning of the language used. "Raw or crude state," — "raw" means "uncooked"; so does "crude." Worcester defines crude thus: "in a raw state; raw; uncooked; undressed": "not ripened; immature; unripe." Durand's patent does not mean by "crude" that the vegetables must be in the same state in which they grew, but as equivalent to "raw," that is, uncooked, and in this sense the corn is crude, as much so as the peas and beans that are shelled or the vegetables that may be sliced. Winslow took no such distinction, for he says that his method applies to ears of corn, though he allows that he does not recommend their use.

The subject-matter of the first patent set up by complainants, being neither "an art, a machine, manufacture, or composition of matter," does not come within the purview of patentable things.

The acts of Nathan Winslow and J. W. Jones were, in law and equity, the acts of Isaac Winslow in relation to the public use of the alleged patented rights. 4 Wash. C. C. 536, above cited.

The patentee has claimed more than his own invention. The puncturing the cans to prevent their bursting was neither original nor new. Cooking vegetables in hermetically sealed vessels was well known before the date of the invention claimed by the complainants.

The patent of May 20, 1862, recites this. There has been no disclaimer by patentee. *Singer v. Walmsley*, 1 Fish. 558.

CLIFFORD, J. Inventions lawfully secured by letters-patent are the property of the inventors, and as such the franchise and the patented product are as much entitled to legal protection as any other species of property, real or personal. They are indeed property even before they are patented, and continue to be such, even without that protection, until the inventor abandons the same to the public, unless he suffers the patented product to be in public use, or on sale, with his consent and

allowance, for more than two years before he files his application for a patent. 5 Stat. at Large, 123 ; 5 Ibid., 354.

On the 8th of March, 1853, Isaac Winslow of Philadelphia filed in the Patent Office an application for a patent for "a new and improved mode of preserving green corn," in which he stated that he had invented a new and useful improvement for accomplishing that object, and prayed that letters-patent might be granted to him for that invention. Certain portions of the invention were not illustrated either by drawing or models, and in consequence of that omission the application, on the 1st of August following, was returned to the inventor, leaving it to his option to supply the omission or to modify his claim. He elected to supply the deficiency, and on the 26th of October succeeding he filed in the Patent Office additional drawings and a model of the invention and samples of the patented product. Information from the Patent Office was communicated to the inventor, on the 2d of November, in the same year, that the office did not regard the operation of cutting the corn from the cob as any part of the process of preserving the product, and requesting him to decide whether the office should examine the process of preserving, or that of removing the corn from the cob, under the fee already paid, evidently showing that the office required another fee if both were to be examined. Compelled to elect a second time, the applicant decided to strike out his second claim, and consented to take a patent for the process of preserving the patent product. Nothing further was done until the 19th of the same month, when the Patent Office informed the applicant that the office was of the opinion that his process was substantially the same as that in common use for preserving both vegetable and animal substances. On the 18th of February, 1862, the inventor filed in the Patent Office a new application for a patent, referring to the fact that his prior application, as modified, was rejected, and renewing the prayer that letters-patent might be granted to him for the entire improvement. In the mean time the inventor assigned the business over to his brother and the complainant, with the stipulation that he would give the assignees the benefit of any improvement he should make, and

of his knowledge of the new process. Before the second application for a patent was made the entire inventions were duly assigned to the complainant, and it is proper to remark that the title of the complainant is admitted.

Four several letters-patent were granted for the inventions, and they were all issued in the name of the inventor; but each contains the recital that he had assigned all his right, title, and interest in the invention to the complainant. They are as follows: 1. No. 34,928, dated April 8, 1862, for a new and useful improvement in preserving Indian corn in the green state. 2. No. 35,274, dated May 13, 1862, for a new and useful improvement in preserving green corn. 3. No. 35,346, dated May 20, 1862, for a new and useful improved process of preserving green corn. 4. No. 36,326, dated August 26, 1862, for a new and useful improvement in the process of preserving green corn. Possessed as he is, of the absolute title to those improvements, the complainant claims the full and exclusive right and liberty of making and using the said improvements, and vending the same to others to be used, and he charges that the respondent named in the bill of complaint, then in full life, from the 13th of September, 1867, to the 19th of November in the same year, unlawfully and wrongfully used and practised the described improvements claimed and patented by the complainant. Service was made, and the respondent appeared and filed an answer. Amendments were made to the bill, by consent, admitting new complainants, and also to the answer, allowing the respondent to set up new defences. Reference will only be made to such of the defences set up in the answer as were pressed in argument at the hearing. Argument to show that the title of the complainant is valid, is unnecessary, as that is admitted by the respondent, and the complainant having introduced in evidence the several letters-patent described in the bill of complaint, it is conceded that they afford a *prima facie* presumption that the patentee is the original and first inventor of the several improvements therein described and secured to the supposed inventor. Much consideration need not be given to the question of infringement, as the respondent admits that his foreman — though, as

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he alleges, without his consent — put up certain parcels of green corn preserved substantially by the same process as that described in the specification of the patentee, and substantially the same as covered by his patents, amounting to seven hundred cans, which have been sold and the proceeds and profits have been received by the respondent, as stated in the account annexed to the answer. Unless the patent is sustained, the question of infringement is an immaterial issue, and where it is admitted, and the case shows that profits have been received by the respondent to a substantial amount, the question of the extent of the infringement is usually left to be determined by the master. Viewed in the light of these suggestions, it is quite clear that the case depends upon the defences set up in the answer, as, if no one of them is sustained, the complainants are clearly entitled to a decree.

They are as follows : —

1. That the patentee was not the original and first inventor of the improvements, or either of them, as alleged in the bill of complaint.

2. That the several supposed improvements are merely old methods applied to a new use, and that the several improvements, and each of them, were well known and in public use prior to the alleged discovery and invention of the patentee.

3. That the several improvements were in public use and on sale more than two years before the patentee made his application for a patent.

4. That the patentee abandoned his invention to the public before he filed his application for a patent.

Application was made by the inventor, in the first place, for one patent, to embrace all the several subject-matters described in the four patents subsequently granted by the Commissioner of Patents. Novelty and utility are both required to constitute a patentable invention, within the meaning of the patent law; but where both of those qualities are combined it is settled law that the right to a patent does not depend upon the “quantity of thought,” ingenuity, skill, labor, or experiment, or the amount of money which the inventor may have bestowed or expended upon his production. Curt. on Pat. § 31.

Defences involving the validity of a patent cannot be satisfactorily examined, or their sufficiency or insufficiency determined without first ascertaining what the invention is which is embodied in the patent constituting the subject-matter of the controversy.

Undoubtedly the first patent is for the product of the invention, or for the new article of manufacture, to wit, Indian corn preserved green, or Indian corn preserved in the green state. In his first attempt to preserve the corn in the green state, without drying the same, the patentee states that he did not remove the kernels from the cob, which was not satisfactory, as the article obtained was very bulky, and, when used, the peculiar sweetness of the corn was lost, the same being absorbed, as the patentee supposes, by the cob. Experiments of various kinds were subsequently made to overcome the difficulties attending the effort to preserve the corn without drying the same, which were also unsuccessful, as the kernels, when preserved, did not retain the milk and other juices of the corn, leaving the product hard, insipid, and unpalatable, and without the full flavor of fresh green corn. All such experiments were abandoned, but he finally succeeded in producing an entirely satisfactory article of manufacture, which is the one described in the specification and claim of his first patent. His description of the method of manufacturing the product is substantially as follows: Select a superior quality of sweet corn in the green state, remove the kernels from the cob by means of a curved and gauged knife, or other suitable means, pack the kernels in cans, and hermetically seal the latter, so as to prevent evaporation under heat, or the escape of the aroma of the corn. When packed, the cans of corn are to be exposed to steam or boiling heat for an hour and a half, then puncture the cans and immediately seal the same while hot, and continue the heat for two hours and a half longer. Afterwards the cans may be slowly cooled in a room at the temperature of seventy to a hundred degrees Fahrenheit. Indian corn thus packed and treated, the patentee states, may be warranted to keep in any climate. Being preserved in its natural state, as near as possible, it retains the

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peculiar sweetness and flavor of fresh green corn right from the growing field, and it is only necessary to heat the corn in order to prepare it for the table, as it is fully cooked in the process of preserving. What the patentee claims, in that case, is the described new article of manufacture, to wit, Indian corn when preserved in the green state, without drying the same, the kernels being removed from the cob and packed in cans hermetically sealed and treated substantially in the manner and for the purpose set forth in the specification.

Attention will next be called to the second patent, which purports to embody an invention for a new and useful improvement in preserving green corn, or, in other words, the patented invention is for the process of manufacturing the new product described and patented in the first-mentioned letters-patent. Necessarily the details of the process are somewhat fully given in the specification describing the patented product, but the claim of the first patent does not extend to the process, which shows that the Patent Office committed no error in granting the second patent, as it does not include anything patented in the first patent. *Goodyear v. Providence Rubber Co.*, 2 Cliff. 371; same case, 8 Wall. 798; *Seymour v. Osborne*, 11 Wall. 559.

Both parties agree that it is competent for the Commissioner to grant a patent for the product and one for the process, and it is obvious that the patent under consideration is for the process, which is not included in the prior patent. It has long been common, says the patentee, to boil green or unripened corn, and then to dry the same for winter use, but corn thus dried must be boiled again, when prepared for the table, and is more or less hard and insipid, as it loses the fine flavor of fresh green corn. Ears of corn, also, are sometimes boiled and then hermetically sealed in cans, but the cob seems to absorb the sweetness of the kernels, or, if the kernels are removed from the cob after boiling, and then preserved, still the fine flavor of the natural corn is lost. Many and varied attempts were made by the patentee to preserve green corn on the cob, without drying the same, but all those efforts were unsuccessful, as the article was bulky, and the sweetness of the corn was absorbed by the

cob. Subsequently, he conceived the idea of first removing the corn from the cob, and then boiling or cooking the kernels and preserving them as thus separated from the cob. Some benefit doubtless resulted from that new conception, but a new difficulty arose, as the kernels of corn were broken in being removed from the cob, and the milk and other juices of the corn were dissolved and diluted in the process of boiling, leaving the product insipid and unpalatable. Unable to overcome that difficulty in that mode, he next attempted to cook the corn, without permitting it to come in contact with the water, by exposing the cans containing the corn to boiling water; but he soon found that mode of preserving the corn was unsatisfactory, as a long time was requisite to cook the corn sufficiently for preservation, and it appears that the milk of the corn evaporated and the corn became more or less dried.

Two other patents are set forth in the bill of complaint, but it is clear, that the patents are each for the new and useful improvement in the process of preserving green corn, and that they severally embody substantially the same invention as that described in the second patent. Improvements, consisting of separate and distinct parts, may, in certain cases, be secured by separate and distinct patents, but no more than one patent can legally be granted for the same invention. 5 Stat. at Large, 192; *Sickles v. Falls Co.*, 4 Blatch. 508.

Inoperative patents, or such as are invalid by reason of a defective, or insufficient description or specification, may also in certain cases be surrendered, and the Commissioner, in such cases, is authorized to cause a new patent to be issued to the inventor for the same invention, but the Commissioner does not possess the power to grant a second patent for the same invention, in any case, nor under any circumstances, without the surrender of the first one granted to the patentee. *Suffolk Co. v. Hayden*, 3 Wall. 319; 5 Stat. at Large, 122.

Apply those principles to the case, and it is certain that the third and fourth patents described in the bill of complaint are void. More than one patent for the same invention cannot be legally issued by the Commissioner, but the irregular issuing of



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a second patent cannot impair the right of the patentee under the first patent, if it was valid at the time it was granted. Tested by these rules of decision, it is quite clear that the bill of complaint, as to the third and fourth patents, must be dismissed, but that the complainants are entitled to a decree, for an account, and for an injunction for the infringement of the first and second patents, unless the defences, or some one of them set up by the respondent, are sustained.

The first defence is, that the patentee is not the original and first inventor of the respective improvements. Both patents may be considered together, as all the proofs applicable to one, apply equally to the other, and the positions taken in argument are the same in both, without an exception. Before examining that defence, it becomes necessary to refer somewhat more fully to the nature and peculiar characteristics of the respective improvements in question, in order that the evidence adduced may be fully understood and properly applied. Ears of corn may be boiled and hermetically sealed in cans, without infringing the inventions of the patentee, but the difficulty with that product and the process which produces it is, that the cob absorbs the sweetness of the kernels and the article becomes insipid and unpalatable, and consequently it is not salable to much extent. So the kernels may be removed from the cob after boiling, and then be preserved in cans hermetically sealed, without any conflict with the improvements embodied in the patents described in the bill of complaint, but the process, and the product which it produces, are comparatively valueless, as the fine flavor of the green corn cooked in the usual way is lost in the process of manufacture.

Corn may also be preserved, when in a green state, by removing the kernels from the cob, and boiling or cooking the same, before the kernels are packed in cans hermetically sealed, without subjecting the manufacturer to the charge of infringing these patents; but the difficulty with that process is, that the kernels, in being removed from the cob, are broken, and consequently the milk and other juices of the corn in that state are dissolved in the process of boiling or cooking, and the natural aroma of the green corn cooked in the usual way for the table is lost,

and the product becomes of little or no value as an article of commerce. Attempts were made by the patentee in this case to remedy that difficulty, by packing the kernels in cans not sealed, and exposing the cans containing the kernels to boiling water, but the process was unsatisfactory in other respects, as it required a long time to cook the corn, during which the milk and other juices evaporated, and the corn became more or less dried. All experiments of such kinds having failed to produce the desired result, the inventor adopted the process of removing the corn from the cob, packing the kernels in cans, hermetically sealing the same, and then boiling the cans until the corn therein became completely cooked; but he states that the cans must be very strong or they may burst; and to prevent that, he practised puncturing them, after they became well heated, to allow the air to escape, immediately resealing the same, to prevent the evaporation of the juices of the corn or the loss of the natural aroma. Cans, if sufficiently strong, it would seem, may be used to complete the process, without the necessity of their being punctured, after the boiling is commenced, but, unless the cans are very strong, it is better to puncture them, in order to relieve the internal pressure, and to prevent them from bursting. Even if the cans, when not punctured, as described, do not burst, the air contained in the cans and the vapor become more or less expanded by the heat, so as to press the heads of the can outward, and give the same the appearance of cans which contain the gaseous products of decomposition. Such appearances, even when the corn is perfectly preserved, diminish its value as an article of commerce, which shows that it is better to puncture and reseal the cans, during the process of boiling, unless the cans are very strong.

Taken as a whole, the description in the specification of the respective patents constitutes a full compliance with the requirement of the act of Congress in that behalf, showing that the claim of the patentee in the first patent is the described new article of manufacture, to wit, Indian corn, when preserved in the green state, without drying the same, the kernels being removed from the cob, hermetically sealed and heated substan-

tially in the manner and for the purpose set forth, which is well justified by the description of the invention given in the specification.

His claim in the second patent is for the described process of first removing the corn from the cob, and then preserving the kernels, substantially in the manner and for the purposes set forth, which is also well supported by the antecedent description contained in the specification, to which it is appended. Viewed in any proper light, it is clear that the purpose of the invention, as evidenced by the language of the description throughout, is to preserve not only the farinaceous element of the kernels, but also the milk and juices of the same, which give the peculiar aroma or flavor to green corn when cooked for the table in the usual way, during the season when the kernel is full grown, or nearly so, but before the milk and juices of the kernel become concrete, as in ripe corn. Beyond all doubt, the patented process, if the directions are properly followed, will accomplish the purpose for which it was invented, and will enable the manufacturer to preserve the kernels of green corn with all the milk and other juices of the same, without any chemical or other change, except what is produced by the cooking, which is effected by putting the sealed cans containing the kernels, with their milk and other juices, just as the same were removed from the cob, into boiling water, and keeping the cans with their contents in the boiling water for the period or periods specified in the descriptive part of the specification. Proof to that effect, of the most satisfactory character, is exhibited in the record, and the patented product, as seen everywhere in daily use, fully attests its accuracy and truth. Sufficient has been remarked to show what the improvements are which give rise to the present controversy, and having accomplished that purpose, the next inquiry is whether the patentee is the original and first inventor of the respective improvements.

Tested merely by the pleadings, the affirmative of that issue is upon the complainants, but the complainants having introduced the original letters-patent under which they claim, the rule is well settled, that the burden of proof is changed, and that it is incumbent upon the respondent to show, by satisfactory

proof, that the patentee is not the original and first inventor of the respective improvements as he, the respondent, has alleged in his answer.

Evidence was introduced by the complainants of the most satisfactory character, showing that the patentee, Isaac Winslow, of Philadelphia, discovered the patented process of preserving green corn early in the year 1842, and that he made successful experiments in reducing his invention to practice at Westbrook, in the State of Maine, during the latter part of the summer, or in the early part of autumn of that year, leaving no doubt, that the process discovered was the same as that described in the second patent on which the suit is founded, and that the results were satisfactory to a limited extent. All doubt as to the date of those experiments is removed by the statements of the witnesses, as to the attending circumstances, which could hardly fail to impress the memory so as to prevent unintentional mistake, and there is no reason disclosed in the proofs, to create any distrust as to the integrity of the deponents. Though a resident of Philadelphia, the patentee sometimes went abroad for temporary periods, and in the spring, prior to making those experiments, he wrote from France to his brother-in-law, living at Westbrook, in the State of Maine, requesting him to plant a piece of ground with sweet corn, evidently for the purpose of securing the means of making such experiments, and testing the utility of the new process which he had invented, and it appears that his brother-in-law complied with his request. Pursuant to that arrangement, he visited his brother-in-law, at Westbrook, towards the close of the summer, or early in the fall of that year, and commenced to make experiments to preserve green corn, occupying for that purpose a building situated on the same farm which had previously been used as a card-factory. He worked less than a week that season, and the experiments, to a large extent, were unsatisfactory, as the cans in which the corn was packed were not strong enough to resist the pressure within, occasioned by the boiling. Attempts were made to preserve the corn by cooking it before it was packed in the cans, both by cooking it on the cob and then removing the kernels, and

also by first removing the kernels and then boiling the same, but all of those experiments proved to be wholly unsatisfactory, as all, or nearly all of the corn in the cans spoiled, and all such as was not spoiled was found to be insipid and comparatively tasteless, and of little or no commercial value. Experiments were also made by cutting the kernels of the freshly gathered green corn from the cob, with a gauged knife, and packing the same with their milk and other juices, in cans hermetically sealed, just as the kernels came from the cob, and cooking the same by placing the cans with their contents in a large vessel containing boiling water, and most of those experiments, when the cans proved to be strong enough to resist the inward pressure during the process of boiling, without bursting, were generally satisfactory.

Few or none of the cans were properly constructed, and many of them burst during the process of boiling, and in consequence of that tendency, the patentee found it necessary to take the cans out of the bath before the process of cooking the corn was completed, and to puncture or vent the cans, as described in the specification, immediately resealing and replacing the same in the receptacle of boiling water, until the contents of the cans were cooked sufficiently for table use ; and the proofs show, that when the cans were temporarily vented in that way, the experiments were generally successful. Such experiments were repeated the next year for a few days, during the proper season, and from year to year, to the autumn preceding the time when the patentee made his application for letters-patent.

Practical experience showed that the process subsequently patented was much the most successful in accomplishing the desired object, but the process required strong cans, to prevent them from bursting during the boiling, even when the cans were temporarily vented as described ; and it was a long time before the manufacturer was able to furnish the inventor with an article properly constructed for the purpose, as fully appears from the testimony of the manufacturer of the cans, who was examined as a witness. Application for a patent was filed in the Patent Office, by the inventor, on the 8th of March, 1853;

but the first claim was neither illustrated by drawings, nor by a model, nor did the applicant forward to the Patent Office any specimens of green corn preserved by his process, and the specification, on account of those omissions, was returned to the applicant, leaving it at his option to supply the deficiencies or to modify his claim. He elected to supply what had been omitted when the application was filed, and on the 26th of October, in the same year, filed in the Patent Office additional drawings, together with a model of the invention and samples of the preserved green corn, and requested an early examination of the application and claims. Doubtless the proper officers of the Patent Office complied with this request, as they returned the specification on the 2d of November following, informing him that the office did not regard the operation of cutting the corn from the cob as any part of the process of preserving the same, and requested him to decide which part of the alleged invention the office should examine, whether the process of preserving the product or that of removing the corn from the cob. Obligated to waive one for a time, he struck out the second claim, which covered the process for removing the corn from the cob, and on the fourth of the same month returned the specification, as amended, expressing the hope that the office would be enabled to decide favorably on the remaining claim without delay. His hopes, however, were not realized, as the office, on the 19th of the same month, rejected the amended application, expressing the opinion that the alleged invention was substantially the same as that in common use for preserving meats and vegetable substances.

Except an occasional visit of the patentee to the Patent Office for the purpose of consultation with the Commissioner or examiners, nothing further was done by him to procure a patent until the 18th of February, 1862, when he filed in the Patent Office a second application for a patent, which in substance and effect is the same as the one previously filed by the same party, and which, like the other, seeks to procure letters-patent for the entire invention. Before the rejection took place the claim for the product had been stricken out, so that the claim for that

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part of the invention had never been the subject of decision by the Patent Office. In view of the circumstances, the Commissioner decided to review the whole case, and came to the conclusion that the proofs before him entitled the applicant to letters-patent, both for the product and for the process, as shown in the two patents under consideration.

Two other patents were also issued to the same party, but the court is of the opinion that they are invalid, as having been issued for the same invention as that described in the specification of the second patent. Repeated decisions have established the rule that a patent duly issued, when introduced in evidence by the complainant in a suit for infringement is *prima facie* evidence that the patentee is the original and first inventor of what is therein described as his invention, and when taken in connection with his original application, is *prima facie* evidence that the invention was made at the time the application was filed; but when the patentee proposes to show that his invention is of a date prior to the time when he filed his original application, he takes upon himself the burden of proof, and to maintain that theory as against another patented improvement of the same construction and mode of operation, he must prove not only that he made his invention at the period claimed, but that he reduced the same to practice as an operative machine. *Johnson v. Root*, 2 Cliff. 116.

Suppose that it is so, still the respondent cannot invoke that principle with much effect in this case, as he does not preserve green corn under a patent, and the proofs are entirely satisfactory that the patentee made the invention more than ten years before the application for a patent was filed in the Patent Office. Great difficulty was experienced by the patentee throughout the whole period in procuring cans properly constructed for the purpose, and the proofs show that it was that imperfection and difficulty, more than any other, which prevented him from making an earlier application for a patent. Much examination, in detail, of the parol proofs, introduced by the respondent, to show that the patented process was known or used in the United States before the early experiments made by the patentee, may



well be omitted, as it is not pretended, nor can it be, that any other person, resident in this country either before or since that time, ever invented such a process; and a careful scrutiny of the evidence given by those witnesses as to what was in fact done by the several deponents, will show that no one of them ever preserved any green corn, in the mode of operation circumstantially described in the specifications of the patents, until the witness, in some way, and to some extent, became acquainted with the process of the patentee, either from rumor or from some one who had assisted the patentee in making those experiments, and in most cases not until years after the invention was made, and in some cases, long after the patentee had filed his application for letters-patent in the Patent Office. Careful analysis of the testimony of those witnesses shows that many of them never practised the patented mode of operation at all, as they cooked the corn before the kernels were packed in the cans, and that all those who ever did practise it in any degree, or ever made any near approximation to it, never commenced to preserve green corn in that way, until they had learned something, by rumor or otherwise, concerning the mode of operation which was practised by the patentee. They do not pretend that they invented anything of the kind, but all they claim is, that they were successful in learning what the process was which was practised by the assignor of the complainants.

Beyond all doubt, the patentee was the original and first inventor of the process in the United States, and sufficient appears, even in the proofs introduced by the respondent, to convince the court that the first knowledge which those witnesses ever had of the patented process was procured, directly or indirectly — as by report or rumor — from persons residing near the place where the experiments of the patentee were made, or who had, at some time, been the employés of the inventor, and had assisted in his experiments. Suppose it to be true that the patentee was the first person in the United States who practised the patented process and preserved green corn in that mode of operation, still it is contended by the respondent that he is not the original and first inventor of the improvement, within the meaning of the

patent law, as the process had been previously known and used in some foreign country ; but the decisive answer to that suggestion is, that the mere previous knowledge or use of the thing patented in a foreign country will not defeat a patent issued here to an original inventor, unless it appears that the same invention had been patented in such foreign country or had been described in some public work anterior to the supposed discovery thereof by the patentee, and it is well-settled law that patented inventions cannot be superseded by the mere introduction in evidence of a foreign publication, though of a prior date, unless the description or drawings contain or exhibit a substantial representation of the patented improvement, in such full, clear, and exact terms, as to enable any person, skilled in the art or science to which the improvement appertains, to make, construct, and practise the invention, to the same practical extent as he would be enabled to do if the information was derived from a prior patent. *Seymour v. Osborn*, 11 Wall. 555.

Next, the respondent insists that the process described in the English patent to Peter Durand supersedes the invention of the assignor of the complainant as a prior discovery and for the same improvement. Vegetable substances intended to be subjected to that process, the specification states, are to be put into the vessels selected for the purpose, in the raw or crude state ; but the patentee, in enumerating the articles to be preserved, does not mention green corn, nor does he state whether the kernels are, or are not, to be removed from the cob, or, if to be removed, whether the removal is to be effected in a manner to leave the kernels unbroken, or by means of a gauged knife, as in the mode of operation described in the complainant's patent, nor is any mention made of preserving green corn, or any other vegetable substance, in the natural juices of the article, as in the mode of operation set forth in the patent mentioned in the bill of complaint. Instead of packing the kernels in the vessels selected for the purpose, in their crude state, as suggested in the English patent, the process patented by the assignor of the complainant directs that the kernels should be cut from the cob in a way which leaves a large part of

the hull on the cob, and breaks open the kernels, liberating the juices, to use the language of the patentee, and causing the milk and other juices of the corn to flow out and surround the kernels, as they are packed in the cans, in such a mode that the juices form the liquid in which the whole is cooked, when the cans are subjected to the bath of boiling water.

Evidently much is due to this feature of the patented mode of operation in preserving the product, and causing it to retain the sweetness, peculiar flavor, and natural aroma of green corn as when fresh gathered in the season and boiled for the table, in the ordinary way for family use. Nothing of the kind is suggested in the other specification, and it is quite clear that a careful comparison of the descriptions given of the inventions, in the respective specifications, fully justifies the opinion of the learned expert examined by the complainants, that the two patents are essentially and substantially unlike, to which it may be added, that persons having no other knowledge of the complainant's process than what they derive from perusing the specification of the other patent, would never be able to preserve green corn by that mode of operation. Palpable as these differences in the mode of operation are, they cannot properly be overlooked in determining the issue under consideration, nor are they merely formal, as the proofs are full to the point, that the product manufactured by the process of the complainant is far superior to that preserved in any other known mode. Other vegetables, such as beets and carrots, or peas and beans, may be packed in the cans in a crude state, as they retain their juices, and may be well preserved if entirely secluded from the atmosphere, as by packing them in vessels hermetically sealed; but their chemical composition is very different from green corn, which is much more difficult to preserve in its natural freshness without loss of its peculiar flavor and aroma, as accomplished by the complainant's process. When the kernels are cut from the cob they are opened, and the milk and other juices of the same flow out and become a constituent part of the vegetable substance to be preserved, and if exposed to air in that state for any considerable time, their chemical relations to each other will soon change and the whole

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substance will become sour. Exposure to heat, if seasonable, will remove that tendency, as the relations of the elements of which the substance is composed will become fixed and the danger of putrefaction or souring will be greatly lessened, or entirely averted.

Throughout his experiments the aim of the patentee was to perfect the process of preserving green corn without losing any of the natural juices of the cereal, and to discover the method or means of fixing the elements of the corn in the milky state, so that when packed in vessels to be preserved, their chemical relations to each other would never change unless the vessels containing the corn were opened. Obviously he could not accomplish that purpose by putting the corn into cans in the crude state, or before it was removed from the cob, as the juices of the kernels would be absorbed by the cob in the cooking; nor could he accomplish his object by cutting the kernels from the cob and boiling them in water before they were packed, or by cooking them in open vessels without water, as in the one case the milk would be washed out of the kernels and with it all the peculiar flavor of green corn, and in the other case the aroma and juices of the cereal in the green state would be lost by evaporation. Suggestion is made that the kernels may be removed from the cob without cutting, and, if packed in cans in that state before being cooked, they may be regarded as having been packed in the crude state, which may perhaps be conceded; but two answers are made to that suggestion, either of which is sufficient to show that the suggestion cannot serve to benefit the respondent.

Because that process is substantially different from the complainant's process.

Because the proofs on both sides show that the product, when the green corn is preserved in that mode of operation, is of a very inferior quality, not much better than the product when the corn is boiled before it is packed.

Viewed in the light of these suggestions and of the expert testimony in the case, which corresponds with the same, I am of the opinion that the patents of the complainant's are not super-

seded by the aforesaid foreign patent introduced by the respondent.

Enough has already been remarked to show that the second defence cannot be sustained, as the evidence introduced to show that the patentee is the original and first inventor of the improvements is equally persuasive and convincing to disprove the theory that the inventions are old ones applied to a new use, which is all that need be said upon the subject. Nor is any argument necessary to show that the other defence embraced in the same proposition must be overruled, as there is no evidence in the record to support the theory that the improvements, or either of them, were well known or in public use prior to the alleged discovery and invention of the patentee. Attempts were doubtless made by various persons to preserve green corn prior to the date of the invention in controversy ; but it is so manifest to every impartial inquirer that they were of a character substantially different from the process and product patented by the assignor of the complainant, that it would be a work of supererogation to repeat the explanations which demonstrate the truth of that proposition. Such an issue cannot be properly investigated and determined without first ascertaining what the patented invention is ; but the moment that preliminary inquiry is solved the whole difficulty disappears, as it at once becomes self-evident that none of the methods previously practised embraced the mode of operation invented by the patentee.

Patents otherwise valid may be avoided in a suit for infringement, by proof that the invention was in public use, and on sale, more than two years, with the consent and allowance of the patentee, before he filed his application for a patent, which is the next defence presented by the respondent. Inventions ceased to be patentable, at one time, if permitted to pass into public use, or to be on sale, for any time, with the consent and allowance of the patentee before his application for a patent, but the more recent act of Congress provides, that such public use or sale shall not have any such effect, unless it was continued for more than two years prior to such application. 5 Stat. at Large, 123 ; Ibid. 354.

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Full proof that an invention had been in public use, or on sale, with the consent and allowance of the inventor, for more than two years before the application for a patent was filed in the Patent Office, is a good defence to such an action, if the same is properly alleged in the answer. *Agawam Co. v. Jordan*, 7 Wall. 607; *McClurg v. Kingsland*, 1 How. 209; *Stimpson v. Railroad*, 4 How. 380; *Shaw v. Cooper*, 7 Pet. 318.

Nothing short of proof that the invention was on sale, or in public use, with the consent and allowance of the inventor, for a period exceeding two years, will support such a defence, as the party charged with infringing the rights of an inventor must bring himself fairly within the words of the act of Congress, which justify the acts charged as an infringement. *Ryan v. Goodwin*, 3 Sum. 518.

Such acts, if done without the consent and allowance of the inventor, are plain violations of his rights, and of course will not afford any justification to a subsequent wrong-doer. *Wyeth v. Stone*, 1 Story, 282.

If the sale or use is without the consent or allowance of the inventor, or if the use is merely experimental, to ascertain the value, utility, or success of the invention, by putting it in practice, that is not such a sale or use as will deprive the inventor of his title. *Ryan v. Goodwin*, 3 Sum. 518; *Pitst v. Hall*, 2 Blatch. 229; *McCormick v. Seymour*, 2 Blatch. 240.

Such acts of an inventor, it is well held by Judge Story, are to be liberally construed as acts of an experimental character, nor is the inventor to be estopped by allowing a few persons to use his invention, to ascertain its utility, or by any such acts of use, or indulgence to others to use the same, as are not inconsistent with the clear intention to hold the exclusive privilege, and to secure the same by letters-patent. *Mellus' v. Silsbee*, 4 Mas. 111.

Where the party has subsequently taken out a patent, the court is not authorized to give effect to such a defence to a charge of infringement, except in cases where the proof is clear and cogent. *Wyeth v. Stone*, 1 Story, 281.

Tested by those rules, as the case must be, it is quite clear that the defence under consideration must be overruled, as there

is no evidence in the record to show that the inventions, or either of them, were in public use, or on sale, more than two years before the inventor applied for a patent, or for any shorter period, with the consent and allowance of the patentee, or that he had any knowledge of any such sale, or public use, at the time it was made. On the contrary, the evidence shows that the inventor never gave his consent to any such sales, and that he constantly asserted that he intended to apply for a patent. Sales in some cases were made by his brother, but the evidence shows that the inventor disapproved of the acts, as calculated to produce embarrassment when he presented his application for a patent to the Patent Office. Public use of an invention, unless by the patentee himself, for profit, or by his consent and allowance, will not work a forfeiture of his title, as such forfeiture is not favored unless it clearly appear that the use was solely for profit, and not with a view of further improvements, or of ascertaining its defects, or for any other purpose of experiment in reducing the invention to practice. *Pitts v. Hall*, 2 Blatch. 236.

Inventors have a right to employ all means necessary and proper to enable them to perfect their inventions, and to reduce the same to practice, and it is clear that no such experimental act can justly be viewed as legitimate evidence to support the defence of a prior unauthorized public sale or use of the invention, or a use inconsistent with the right to apply for a patent to secure the exclusive authority to make and use the invention, and to vend it to others to be used, as provided in the patent act. Persons charged with the infringement of letters-patent may set up as a defence that the inventor suffered the invention to be in public use and on sale more than two years before he applied for a patent, and they may also set up as a distinct defence, even in the same answer, that the inventor, before he applied for a patent, abandoned the invention to the public, but those two defences ought not to be blended in the same allegation, as they depend in many respects upon very different principles. Some of the amendments to the answer, however, were filed by consent, and inasmuch as no exception was taken to this part of the answer, the question of abandonment, as pleaded, may be considered as open.



As pleaded, the defence is that the inventor abandoned the invention to the public before he filed his application for a patent. His first application was filed on the 8th of March, 1853, and he filed the second application on the 18th of February, 1862, which it is conceded is substantially the same as the first one, which is still on file in the Patent Office. Evidence of an affirmative character to show that the inventor ever uttered a word or did an act signifying an intention to abandon his invention to the public before he filed his first application for a patent is entirely wanting, nor is there any circumstance introduced in evidence to support that theory, except the mere lapse of time from the discovery of the invention to the filing of the application, and it is settled law that the mere forbearance to apply for a patent, during the progress of experiments and until the party has perfected his invention, and tested its value by actual practice, affords no just grounds for any such presumption. *Kendall v. Winsor*, 21 How. 328; *Agawam Co. v. Jordan* 7 Wall. 607.

Apply that rule to the present case, and it is clear that the proofs furnish no ground for such a presumption before his first application was improperly rejected by the Patent Office. Such an adverse decision operates as a great discouragement to an indigent inventor, as was strikingly illustrated in the case of the inventor of the improved mode of manufacturing wool, who, in consequence of such a decision, was kept out of the enjoyment of the fruits of his genius for forty years. *Agawam Co. v. Jordan*, 7 *Ibid.* 604.

Abandonment or dedication of an invention to the public, being in the nature of a forfeiture of a right, is not favored in law, and Mr. Justice Nelson decided that such a defence could not be sustained, unless the acts of the party invoked for the purpose were corroborated by some declarations manifesting such an intention; but it is not necessary to apply that rule in this case, as the evidence fails to disclose either any act or declaration to support the theory. Argument to show that the inventor was entitled to a patent, at the time his first application was rejected, is unnecessary, as the proposition stands confessed

by the Patent Office. Nothing beyond the decision of the office, reversing their former action, would seem to be required to establish that proposition; but if more be needed, it will be found in the reasons which the office assigned at the time for refusing to issue the patent. Those reasons, it will be recollected, were, that the alleged invention was substantially the same as that in common use for preserving meats and vegetable substances, which shows, beyond all doubt, that the office never gave the subject a proper examination, or utterly failed to understand the nature of the improvement, or to comprehend the mode of operation, as scientifically described in the specification. Truth was crushed for the moment, but, happily for the cause of justice, the reasons given for the erroneous decision remained on file, which enabled the office, at a later period, to correct the error, and to do justice to a meritorious inventor. Construed strictly, the defence of abandonment, as pleaded, has respect only to the period of time which elapsed between the discovery of the invention and the filing of the first application, which was rejected; but the respondent insists, in argument, that the inquiry under that issue extends also to the facts and circumstances which occurred between the times when the first application was rejected, and the filing of the second, which with some hesitation, is admitted, as it is by no means certain that a second application was necessary. *Suffolk Co. v. Hayden*, 3 Wall. 319; *Godfrey v. Eames*, 1 Wall. 325.

Delays in the Patent Office, which an inventor cannot prevent, will not impair his title to his invention, nor can any use of the invention during such delays, if without his consent and allowance, afford any evidence to support the issue that the inventor abandoned the invention to the public. *Howe v. Williams*, 2 Cliff. 262; *Stimpson v. Railroad*, 4 How. 402; *Goodyear v. Day*, Laws Digest, 363; *Morris v. Huntingdon*, 1 Paine, 348.

Suppose, however, the period between the rejection of the first application and the filing of the second is as much within the issue presented by the answer as the period between the discovery of the invention and the filing of the first application, still I

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am of the opinion that the defence that the inventor abandoned his invention to the public is not sustained by the evidence exhibited in the record. No one but the inventor is competent to abandon his invention to the public. His acts and declarations, if explicit, are sufficient for the purpose, or he may accomplish the same end by continued acquiescence in the acts of others, of which it appears that he had knowledge; but the proof of knowledge and acquiescence must be beyond all reasonable doubt, as every presumption is the other way. *McCormick v. Seymour*, 2 Blatch. 255.

Testimony is introduced by the respondent showing that the brother of the inventor made sale of small quantities of the preserved corn, on several occasions, but the record does not contain any evidence that the inventor ever sold any of the patented product, or that he ever gave his consent that the product should be sold by his brother or any other person before he filed his application for a patent. Prior to the application for a patent, the better opinion from the evidence is, that none of the product of the new process was put upon the market, as the evidence is satisfactory that he knew that sales or public use more than two years before he applied for a patent would defeat his right. Immediately upon filing his application for a patent, he gave a license to his brother and the first-named complainant, and received a royalty from them for their manufacture. Small amounts only were manufactured, and few sales only were made subsequent to the rejection of the first application.

When a party practises his invention, merely for the purposes of experiment or completion, before he takes out a patent, the inference that he intends to surrender the invention to the public does not arise, and consequently a dedication to the public cannot be proved by evidence that shows only experimental practice, by the inventor or his employés, whether in public or private. Such an inference is never favored, nor will it in general be sufficient to prove such a defence, unless it appears that the use, exercise, or practice of the invention was somewhat extensive, and for the purpose of gain, evincing an intent on the part of the inventor to secure the exclusive benefits of his inven-

tion without applying for the protection of letters-patent. Curtis on P. (3d ed.) § 389.

Exceptional cases arise, as where the invention, by acts of the inventor, has gone into general public use, and got beyond his control, without any effort on his part to restrain its general use, and in such a case it is held that he cannot resume the ownership dedicated to the public, and that his right to a patent is forfeited. Speaking of such a case, however, Judge Story said in *Mellus v. Silsbee*, 4 Mas. 111, that the inventor "is not to be estopped by licensing a few persons to use his invention to ascertain its utility, or by any such acts of peculiar indulgence and use as may fairly consist with the clear intention to hold the exclusive privilege." Tested by that rule, it is quite clear that the single license referred to, which was not granted until after the application for a patent was filed, and which was never exercised except to a very limited extent, is wholly insufficient to support the defence that the inventor abandoned the invention to the public. All must agree that he did not intend to dedicate it to the public, because his application for a patent was then pending in the Patent Office, and the evidence shows that he continued to press it, with confident hopes of success, until the adverse decision was announced. Nor does the record exhibit any evidence to show that the invention got into public use with the consent and allowance of the inventor, or through any negligence or improvidence on his part. On the contrary, it appears that he visited the Patent Office as often as it was necessary, to ascertain whether the opinion of the Commissioner had undergone any change, and that he presented his second application for a patent as soon as he could obtain any hope of receiving a decision in his favor. No persons, except the two before mentioned, ever had authority from him to practise the invention; and the proofs show that all others who did practise it before the date of the letters-patent obtained their information, whether from rumor or otherwise, without the consent and allowance of the patentee.

Separate examination of the other foreign patents introduced by the respondent does not appear to be necessary, as the stress of the argument to show that the patentee in the patent of the

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complainant was not the original and first inventor of the improvement, seems to rest upon the Durand patent, which the principal expert of the complainant says would not succeed with green corn, and he supports that conclusion with reasons which are both persuasive and convincing. Due attention to the nature of the invention in question and to its described mode of operation is all that is necessary to render the reasons given by the witness conclusive, as it is clear that the patent in the other case does not contain a word to indicate that the patentee ever thought of removing the kernels from the cob by means of a gauged knife, for the purpose of liberating the juices of the same, so that the kernels, as packed in the cans, would be cooked in their own juices when the cans are placed in the bath of boiling water. Sweet corn, in the green state, as the witness testifies, is a peculiar substance, differing materially from any other cereal, seed, fruit, or vegetable used as food. Its composition and structure are such that it is singularly susceptible to fermentative decompositions and changes, more so than any fruit or vegetable that has been successfully preserved in hermetically closed packages for any considerable length of time. Such liability to rapid change is not due to any one particular constituent, but to the presence together of several substances, such as gluten, sugar, fat, and starch, in such proportions as are best adapted for fermentation and action upon each other. Its peculiar flavor, other than its sweetness, is contained in, and associated with, the fat or oil present, so that very slight fermentations of the other constituents are sufficient to destroy that peculiar aroma.

Green corn of the kind mentioned, in common with other cereals, contains more phosphorus or phosphoric acid than fruits or other vegetables. As compared with sweet peas, for instance, the kernels of sweet corn are much more delicate and liable to change, as they contain a much larger proportion of milk, juice, or sap, which itself contains more sugar, starch, and oil than the juice of sweet peas; and the glutinous or nitrogenous constituent, which acts as the ferment or primary cause of change, is much more active in the juice of sweet corn than in that of

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sweet peas. Equally instructive support to the same view is derived by comparing sweet corn with such fruits as peaches, as the juice of the peach contains no oil, and the kernels of sweet corn contain only one eighth as much water as the peach, besides other differences of an equally important character, showing that such fruits as peaches are much less liable to ferment than sweet corn, and that they are much more easily packed and preserved. Examined in the light of these suggestions, as the case should be, it is quite clear that the mode of operation described in the specification of the complainant's patent differed widely from anything which preceded it, and that it effects a new and highly useful result; and for these reasons the complainants are entitled to a decree, for an account, and for an injunction.

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## RHODE ISLAND DISTRICT.

JUNE TERM, 1873.

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BEFORE CLIFFORD AND KNOWLES, JJ.

CHARLES A. NICHOLS, Assignee, v. AMASA M. EATON *et al.*

The proviso of a will bequeathing all the testator's property to certain trustees was as follows: "Provided also that, if my said sons respectively should alienate or dispose of the income to which they are respectively entitled under the preceding trusts; or if, by reason of the bankruptcy or insolvency of my said sons respectively, or by any other means whatsoever, the said income can no longer be personally enjoyed by my said sons respectively, but the same or any part thereof shall, or but for this present provision would, belong to, or become vested in or payable to, some other person or persons, — then the trusts hereinbefore expressed concerning the said income, or concerning so much thereof as should or would have so become vested in or payable to any other person or persons other than my said sons respectively as aforesaid, shall immediately thereupon cease and determine. And the same income shall be applied by my said trustees during all the then residue of the life of my said sons respectively in manner following, that is to say, upon trust to pay and apply the said income, or such part thereof as aforesaid, to and for the support and maintenance, or otherwise for the use and benefit, of the wife, child, or children, for the time being, of my said sons respectively, or such one or more of such wife, child, or children, and in such manner as my said trustees in

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their discretion shall think proper, and as to such wife for her sole and separate and inalienable use; and in default of any object of the last-mentioned trust at any period during the life of my said sons respectively, and when and so often as the same shall happen, then, upon trust, from time to time, so long as such vacancy or want of objects shall continue, to accumulate and invest the income aforesaid in augmentation of the principal or capital thereof in the nature of compound interest, with power of changing investments as hereinbefore expressed; and in case, at any time after my decease, such accumulation should cease to be lawful, then, upon trust, to apply the said annual produce and income, or such part thereof as may not legally be accumulated during said want of objects as aforesaid, in such and the like manner as the same would be applicable under the ulterior trusts of this my will." *Held*, such provision was valid and the life-interest given to the son ceased and determined at his bankruptcy.

Where trustees under a will have a discretion as to the manner of the application of the trust-fund for the benefit of a particular person, but no power to apply it otherwise than for his benefit during his life, his interest in case of bankruptcy passes to the assignee; but in this case the life estate was expressly determined by the act of bankruptcy.

Such a provision as above recited passes the income from the bankrupt into the control of the trustees, for the benefit, at the trustees' discretion, of the wife or children of one or more of the sons; and if these objects fail, the trustees are required to retain the income, to accumulate and pass, after the death of the sons, under the ulterior trusts of the will.

The will contained also the following provision: "And in case, after the cessation of said income as to my said sons respectively, otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay or to apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened." *Held*, Under that clause no right vested in the bankrupt to any portion of the income which he could enforce in any court of law or in equity.

These words conferred upon the trustees a power to be exercised or not, at their discretion, and one which, if exercised, exonerated them from liability for not applying such portion of the income under the limitations of the clause first recited; but the first clause controlled their action as to the whole fund, unless a portion was withdrawn from those limitations by the exercise of the discretionary power given them.

Property in trust cannot pass to the assignee in bankruptcy where the will provides for an absolute cesser of the bankrupt's interest on the event of bankruptcy, if the will provides for the vesting of the interest in some other person.

BILL in equity brought to enforce a claim to certain interests alleged to have belonged to Amasa M. Eaton, a bankrupt, out of the estate of his mother Sarah B. Eaton, and which complainant alleged were vested in him as assignee in bankruptcy.

On the 1st of May, 1864, Sarah B. Eaton of North Providence made her last will and testament, by which she devised all her estate, real and personal, to three trustees, who were invested with certain extraordinary powers and discretions. Most of the facts were admitted, or not the subject of controversy, and may be stated as follows:—



Mrs. Eaton at the date of her will was a widow having four children, three sons and one daughter, and it was agreed that the daughter died unmarried and without children, subsequent to the death of the mother and before her brother Amasa was adjudged a bankrupt. By her will, Mrs. Eaton devised her estate, real and personal, to three trustees, to pay the rents, profits, dividends, interests, and income of the trust property unto and equally among her four children for and during their respective natural lives, and after their decease in trust for such of their children as should attain the age of twenty-one years or die under that age having lawful issue living at his, her, or their decease; and his, her, or their heirs and assigns, if more than one, as tenants in common, subject to the condition that "if any of my said children shall die without leaving any child who shall survive me, and shall attain the age of twenty-one years, or die under that age leaving lawful issue living at his or her decease, then as to the share or respective shares, as well original as accruing, of such child or children respectively, upon the trusts herein declared concerning the other share or respective shares." Claim was made by the complainant as assignee in bankruptcy of Amasa M. Eaton, one of the sons of the testatrix, to his share of the rents, profits, dividends, interest, and income of the trust estate within the control of the trustees named in the will. Amasa was a member of the firm of Bailey & Eaton, and it was admitted that the firm, on the 1st of March, 1867, became insolvent, and that they made an assignment of their property to the complainant, and it appears that Amasa, on the same day, made an assignment of all his individual property to the same party for the benefit of his creditors, and that he, on the 24th of December following, was adjudged a bankrupt, and that the complainant was duly appointed his assignee as alleged in the bill of complaint.

Prior to that decree there was no question that he was entitled to one fourth of the income of the trust estate, until the death of his sister, and that subsequently to the decree in bankruptcy he was entitled to one third of the income, as it was admitted that she was never married, and that she died childless.

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*Horatio Rogers* and *C. S. Bradley*, for complainant.

Property left in trust passes to an assignee in bankruptcy. This can be avoided only by an absolute cessor of the bankrupt's interest, and provisions vesting that interest in some other person. *Brandon v. Robinson*, 18 Ves. 429; *Tillinghast v. Bradford*, 5 R. I. 205. The provisions of the will are ineffectual for that purpose. 1. Because deficient in its own terms, being but a misapplication of a portion of the usual legal phraseology employed for such purposes. In construing it we can only consider the terms that have been used, and cannot import into it other terms, though usually employed for such purpose. There is no limitation over to any other person or persons of the trust income of the bankrupt accumulating during his life in the absence of wife or children. 2. Because of the discretionary clause by which it was followed and controlled, there being no persons or objects alternative to the bankrupt, in favor of whom, in the absence of wife or children, this discretion can be exercised. Where property is left upon such a discretion as exists in this will it enures to the assignee in bankruptcy. *Snowden v. Dale*, 6 Sim. 524; *Green v. Spicer*, 1 Russ. & Myl. 395; *Kearsley v. Woodcock*, 3 Hare, 185; *Page v. Way*, 3 Beav. 20; *Lord v. Bunn*, 2 You. & Coll. 98; *Younghusband v. Gisborne*, 1 Coll. 400; *Davidson v. Chalmers*, 33 Beav. 653; Same case, 12 Weekly Reporter, 592; *Wallace v. Anderson*, 16 Beav. 533; *Graves v. Dolphin*, 1 Sim. 66; *Piercy v. Roberts*, 1 Myl. & K. 4; *Bryan v. Knickerbacker*, 1 Barb. Ch. 409; 11 Bythewood's Conveyancing (3d ed.), 486, note *a*; same vol., 711–713 and forms referred to; *Pym v. Lockyer*, 12 Sim. 394; *Rippon v. Norton*, 2 Beav. 63.

Any discretion that has been or that may be exercised by the trustees under Mrs. Eaton's will in favor of the bankrupt, must enure to the assignee in bankruptcy. At least the interest of the bankrupt, under his mother's will, after his bankruptcy, is but a conditional estate. U. S. Bankrupt Act, § 14; James' Bankrupt Law, 41, title "Conditional Estates"; 11 Bythewood's Conveyancing (3d ed.), 486, note *a*; *Lord v. Bunn*, 2 You. and Coll. 98; *Davidson v. Chalmers*, 33 Beav. 653; and other

cases cited *supra*. The discretion has been exercised in favor of the bankrupt and is binding. *Bryan v. Knickerbacker*, 1 Barb. Ch. 409. An agreement for its exercise was made and is binding. The peculiar circumstances of this case make the doctrine applicable.

*Samuel Currey* and *B. R. Curtis*, for respondent.

CLIFFORD, J. Assignees in bankruptcy are chosen by the creditors of the bankrupt; and it is made the duty of the judge—or, where there is no opposing interest of the register, by an assignment under his hand—to assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto. And the provision is that such assignment shall relate back to the commencement of the proceedings in bankruptcy, and that the title to all such property and estate, both real and personal, shall, by operation of law, vest in said assignee; and the further provision is that the assignee shall have like remedy to recover all said estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. 14 Stat. at Large, 522–524.

Assignees in bankruptcy, except in cases of fraud, take only such rights and interests as the bankrupt had and could himself claim and assert at the time of the bankruptcy, and they are affected with all the equities which would affect the bankrupt himself if he were asserting those rights and interests. *Mitchell v. Winslow et al.*, 2 Story, 637; *Brown v. Heathcote*, 1 Atk. R. 162; *Mitford v. Mitford*, 9 Ves. 100; 1 Jarman on W. 816; *Hall v. Gill*, 10 Gill. & J. 325.

Much discussion of that proposition is unnecessary, as it is conceded by both parties, and is supported by the highest authority. Tested by that rule, the question is, whether the bankrupt, at the date of filing his petition in bankruptcy, had any vested interest in the estate of his mother under her will, which must depend upon the construction of the principal proviso, to which reference will now be made. It is as follows: “Provided also that, if my said sons respectively should alienate or dispose of the income to which they are respectively entitled under the pre-

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ceding trusts ; or if, by reason of the bankruptcy or insolvency of my said sons respectively, or by any other means whatsoever, the said income can no longer be personally enjoyed by my said sons respectively, but the same or any part thereof shall, or but for this present provision would, belong to, or become vested in or payable to, some other person or persons, — then the trusts hereinbefore expressed concerning the said income, or so much thereof as should or would have so become vested in or payable to any person or persons other than my said sons respectively as aforesaid, shall immediately thereupon cease and determine. And the said income shall be applied by my said trustees during all the then residue of the life of my said sons respectively in manner following, that is to say, upon trust to pay and apply the said income, or such part thereof as aforesaid, to and for the support and maintenance, or otherwise for the use and benefit, of the wife, child, or children, for the time being, of my said sons respectively, or such one or more of such wives, child, or children, and in such manner as my said trustees in their discretion shall think proper, and as to such wife for her sole and separate and inalienable use ; and in default of any object of the last-mentioned trust, at any period during the life of my said sons respectively, and when and so often as the same shall happen, then, upon trust, from time to time, so long as such vacancy or want of objects shall continue, to accumulate and invest the income aforesaid in augmentation of the principal or capital thereof in the nature of compound interest, with power of changing investments as hereinbefore expressed ; and in case, at any time, such accumulation should cease to be lawful, then, upon trust, to apply the said annual produce and income, or such part thereof as may not legally be accumulated during said want of objects as aforesaid, in such and the like manner as the same would be applicable under the ulterior trust of this my will.”

Fraud cannot be imputed to the testatrix, as the estate was her own, which she was at liberty to give or not to her children as she saw fit ; and, inasmuch as the bankrupt never had any interest in it other than what is devised to him by the will, it is clear that his assignee acquired nothing by virtue of the assignment

except the interest which vested in the debtor at the time he filed his petition in bankruptcy. Nothing certainly vested in him except what was devised; and the nature and extent of the devise must be controlled by the intent of the testatrix as expressed in the will, unless the intent is one in violation of law. Apply that rule to the case and it is as clear as anything can be that the estate devised to the son, in the income of the trust-fund, ceased and was determined at the bankruptcy of the devisee. No other conclusion can be reached, as the testatrix so declares in express words; and she further provides an entirely new direction for such share of the income, giving it to the wife or wives of such son or sons, in the discretion of the trustees, empowering them, if they see fit, to exclude from any share of such income the wife and children of any such bankrupt son; and if those objects of the trust should fail, the provision is that such portion of the income shall go to the trustees, to accumulate as a portion of the ulterior trust of the will.

Such a provision in a will is valid, as is settled by numerous authorities not open to question. *Brandon v. Robinson*, 18 Ves. 433; *Cooper v. Wyatt et al.*, 5 Madd. Ch. R. 297; *Rochford v. Hackman*, 10 Eng. L. & Eq. 67; 2 Story Eq. (§ 974 and p. 285).

Cases may be found undoubtedly where doubts have been expressed whether the provision that the estate shall be determined by the bankruptcy of the legatee is sufficient to accomplish the object unless the will goes further and provides for the future disposition of the estate; but no such question arises in the case before the court, as the will contains a provision which entirely obviates the force of any such suggestion.

Satisfactory explanations upon this point will be found in the case of *Rochford v. Hackman*, 10 Eng. L. & Eq. 67, to which reference is made for the purpose.

Where trustees under a will have a discretion as to the manner of the application of the trust-fund for the benefit of a particular person, but no power to apply it otherwise than for his benefit during his life, his interest in case of bankruptcy passes to his assignee; but the case before the court is entirely of a

different character, as his life-estate is expressly determined by the act of bankruptcy, and the trustees are expressly empowered to make a different disposition of the income, showing that the case is controlled by the general rule established by the prior authorities. *Green v. Spicer*, 1 Russ & Mylne, 395.

Enough has been remarked to show that it was the intent of the testatrix that the life-interest given to the son should cease and be determined by his bankruptcy; but the complainant contends that the provisions of the will are insufficient to prevent the estate from vesting in the bankrupt and from passing from him to his assignee, for two reasons, which deserve a separate consideration:—

Because, as he contends, “there is no limitation over to any other person of the trust income of the bankrupt, accumulating during his life in the absence of wife or children.” But such, in the judgment of the court, is not the effect of the limitation expressed in the will. On the contrary, it does pass the income from the bankrupt into the control of the trustees for the benefit, at the trustees’ discretion, of the wife or children of one or more of the sons; and if those objects fail, the trustees are expressly required to retain the income to accumulate and pass, after the death of the sons, under the ulterior trusts of the will. Nothing is to go to the bankrupt under the provision in any event, nor is he to acquire any right to any portion of the same, but he is absolutely barred therefrom by the express words of the clause.

Concede that, still it is contended by the complainant that the discretionary clause subsequently found in the will, vests in the bankrupt some interest in or claim to a portion of the income of the trust-estate, which by operation of law passed to his assignee under the instrument of assignment executed agreeably to § 14 of the Bankrupt Act. By that clause it is declared that it shall be lawful for the trustees in their discretion, but without its being in any manner obligatory upon them, in case at any future period circumstances should exist which in their opinion should justify or render expedient the placing at the disposal of the donees respectively any portion of the real and per-

sonal estate, to transfer absolutely to them respectively, for his or her own proper use and benefit, any portion, not exceeding one half, of the trust-fund from whence his or her share of the income under the preceding trusts shall accrue; and immediately upon such transfer being made, the trusts hereinbefore declared concerning so much of the trust-fund shall absolutely cease and determine. Appended to that clause also is the following provision: "And in case, after the cessation of said income as to my said sons respectively otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay to or apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened." Obviously, in construing that provision, it must be assumed throughout that all the rights which the bankrupt had before that time enjoyed under the will were determined by the bankruptcy. All such rights being determined, the only question is, whether he acquired any new rights under that clause, or, in other words, whether the clause vested in the bankrupt any property interest in the income of the trust-fund. Carefully examined, the language found in the will is very precise and expressive in its legal effect, so much so that it may be said to speak its own construction. It is as follows: "In case, after the cessation of said income as to my said sons respectively otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay or apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such parts of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened." Under that clause, no right whatever vested in the bankrupt to any portion of the income which he could enforce in any court of law or equity. Such a



claim cannot be recognized by any court, as the property is held by the trustees under the limitations in case of bankruptcy provided in the antecedent clause, and could not pass under those limitations unless some portion of it was paid to, or applied for, the use of the bankrupt or his wife and children by the trustees, in their discretion, it being expressly declared by the testatrix that no obligation is imposed upon the trustees to pay any sums to him or them, or to apply a dollar in that direction, the provision being that it is lawful in the contingency described, for the trustees to do so, but without its being obligatory, showing that it is a mere naked power in the trustees which vested nothing, either in the bankrupt or his wife and children, which either he or they could enforce under any circumstances. Courts cannot adjudge under that language that such an appropriation is obligatory,—that by it the trustees are compellable to allow a portion of the fund for the use of the bankrupt or his wife and children, as the will provides that it shall not be obligatory upon them to make any such appropriation, and it is not competent for the court to alter the will or to make a new one for the decedent.

Properly construed, it is clear that these words confer upon the trustees a power to be exercised or not, in their discretion, and one which, if exercised, exonerates them from liability for not applying such portion of the income under the limitations declared in the antecedent clause; but it is equally clear that the limitations declared in the prior clause must control their action in respect to the whole fund, unless some portion of it is withdrawn from those limitations by the exercise of that discretionary power.

Different rules apply where an absolute trust is created for the benefit of a party, his wife and family; but a discretion is vested in the trustees as to the time and manner of executing the same, or of apportioning the amount among the beneficiaries entitled to receive the income or fund, as it is well held in that class of cases that a right of property vests in the bankrupt beneficiary, and that such right of property will pass to his assignee. Such a party is entitled to something, and, having a valid claim for it, his interest passes by the instrument of assignment; but in the

present case the bankrupt is not entitled to anything as matter of right, as the power to grant or withhold rests entirely in the discretion of trustees. They may give or withhold, in their discretion; and if they refuse to pay anything, or to apply any portion of the fund to such a use, neither the bankrupt nor his wife and children have any claim upon them for the income, or for any damages for refusing to exercise the power. *Perry on Trusts*, 453, 454.

Property in trust, it is conceded, may not pass to an assignee in bankruptcy in a case where the will provides that in that event there shall be an absolute cessor of the bankrupt's interest, if the will contains a provision that his interest shall in that event vest in some other person. *Tillinghast v. Bradford*, 5 R. I. 205; *Dommet v. Bedford*, 3 Ves. 149; *Joel v. Mills*, 3 Kay. & J. 458; *Rochford v. Hackman*, 9 Hare, 475.

But the complainant insists that where property is left upon such a discretion as exists in the will under consideration, it passes to the assignee in bankruptcy. Provisions of various kinds have been framed by conveyancers to effect such an object as that contemplated by the testatrix in this case, that is, that the trusts expressed in the will respecting the income of the life estate shall cease and determine by reason of the bankruptcy of the beneficiary or donee; and a learned author expresses the opinion that the only mode of effectuating the object, often anxiously entertained by donors, of securing the corpus of the property against the acts of the donee himself and the claims of his creditors, is to invest a third person with a discretionary power either to give or withhold it as he may think best, in short to defer absolutely all proprietary interest in the intended object of bounty until its application to his use, by the testator's nominee, and ultimately to give to another what remains so unapplied at the decease of the deviser. Evidently every one of these conditions was adopted in the will in question to the very letter, and it is equally clear that the defence is fully supported by that authority. *Hayes & Jarman on Wills* (7th ed.), 199.

Forms for such a provision in a will are given by conveyancers of the highest repute, and those forms have the sanction of a learned annotator. 11 *Bythewood's Conveyancing* 713 (3d ed.).

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Exactly the same views are expressed by Mr. Jarman in his work on Wills, in which he says, "the vesting in trustees of a discretion as to the mode in which income is to be applied for the benefit of a *cestui que* trust does not take it out of the operation of bankruptcy or insolvency, to effect which the discretion of the trustees must extend not merely to the manner of applying the income for the benefit of the *cestui que* trust, but also to the enabling them to apply it either for his own benefit or for some other purpose." 1 Jarman on Wills (2d Am. ed.), 821.

By making the payment of an annuity depend upon the discretion or will of a third person, says Mr. Atherly, no disposition can be made of it, nor can it be come at by creditors either at law or in equity, but then the payment of the annuity depending upon the mere pleasure of the trustee, the *cestui que* trust has no certain ascertained interest in it, which is the exact description of the case before the court. Atherly on Marriage Settlements, 833. Opposed to these views are the remarks of the annotator in Hayes and Jarman on Wills in which he says "that according to a recent case in order to exclude the claim of the assignees in bankruptcy, the power should be made incapable of being exercised in favor of the bankrupt after such event, or in other words the property should in bankruptcy be absolutely given over to another in like manner as at death." Reference is made to the case of *Piercy v. Roberts*, 1 M. & K. 4, as authority for the doctrine, but the case cited in the judgment of the court affords no support whatever to the views expressed by the annotator. In that case £ 400 were devised in trust to the executors to apply and dispose of, for the sole use and benefit of the son of the testatrix in such manner as the executors should in their discretion think best, and in the case of the death of the son before the whole fund was exhausted, the balance not applied was to become a part of the residuary estate of the testatrix. Insolvency of the son followed before the sum was applied to his use, and the Master of the Rolls held that the bankruptcy of the son terminated the discretion of the executors and that the unapplied balance vested in the assignee. Later cases such as *Twopenny v. Peyton*, 10 Sim. 487, *Wallace v. Anderson*, 16 Beav. 536, seem

to deny that the discretion of the trustees ceases in all cases of bankruptcy, but it is not necessary to decide that point in the present case, as the provisions of the will in question differ widely from the clause under revision in the case of *Piercy v. Roberts*, where it is clear there was an absolute trust established by the will in favor of the son, and the only discretion vested in the executors was as to the amount they should apply and the time and manner of directing the application. Perry notices this distinction in his valuable work on Trusts, nor is there anything in the case of *Piercy v. Roberts*, which affords any countenance whatever to the proposition that the trustees must be made incapable of exercising the discretion in favor of the bankrupt, in order to prevent the fund from passing to the assignee so long as the power conferred is a mere discretionary power to be exercised or not as they shall see fit, as it is clear that such a mere naked power does not carry with it any vested right in the donee which can be enforced in a court of law or equity.

Attempt was made to show that the trustees, in the exercise of their discretion, had applied a certain portion of the life interest of the trust-fund for the use of the bankrupt legatee, and the argument is that such portion of that fund as was not expended at the time the petition in bankruptcy was filed, passed to the assignee, but the court is of the opinion that the proofs do not sustain the proposition that anything so applied remained unexpended when the petition in bankruptcy was filed, which is all that need be remarked in answer to that suggestion.

Other propositions were discussed at the bar, but having determined that the bankrupt had no estate which could pass to his assignee, it is not necessary to examine the other issues between the parties.

The bill of complaint is dismissed with costs.

## J. L. SNOW and D. B. LEWIS v. DAWSON MILES.

## BEFORE CLIFFORD AND SHEPLEY, JJ.

Objections to the form of an action are usually considered as waived by the submission of a case to the decision of the court upon an agreed statement of facts, unless such objections are expressly reserved for the consideration of the tribunal to which the submission is made.

Where a contract was alleged to be shown by letters, it was *held* that all objection to their admissibility on the ground that they were not stamped — the act of Congress then requiring *contracts* in writing to be stamped — was waived by the annexing of the letters, without reservation, to the agreed statement of facts under which the case was submitted.

Where the declaration contains the general counts in addition to a special count which may contain many causes of action, the payment of money into court, generally upon the whole declaration, is not an admission of the defendant's liability, upon the special count.

By such payment the defendant does not admit any specific contract ; the only effect is, that he admits a liability on some one or more of the causes of contract set out in the declaration, not exceeding the amount paid into court.

An offer of a bargain from one person to another imposes no obligation upon the one unless it is accepted by the other according to its terms.

Departure from or qualification of those terms invalidates the offer.

Until the terms of the agreement have received the assent of both parties, the negotiation is open and imposes no obligation.

THIS was an action of assumpsit, and the case came before the court upon an agreed statement of facts. On the 25th of November, 1868, the parties entered into a written contract, as set forth in the declaration, in which the defendant promised to deliver to the plaintiffs, on or before the 15th of February of the next year, two hundred tons of logwood of a good merchantable quality on the wharf at Boston, at \$19.50 gold per ton, and the agreed statement showed that he failed to deliver the logwood at the time specified in the contract.

Importations failing, the defendant, on the 13th of May, 1869, wrote to the plaintiffs that he did not wish that any expenses should be incurred in the matter ; that he had two small vessels of one hundred and sixty tons each in the foreign market, which he had directed his agent to load with logwood without regard to price, and that he believed the vessels would get cargoes, and that the vessels should "be here," that is, would arrive in the

port of Boston during the next month. Pursuant to these representations he requested the plaintiffs to await the arrival of those vessels, assuring them that thereupon he would deliver the logwood, as specified in the written contract.

They replied upon the 15th of the same month, accepting the proposition, and requested the defendant to advise them of the arrival of the vessels, and stated to the effect that they, when so advised, would promptly inform him how to ship the logwood to them, evidently showing that they did not expect any further communication from him until the vessels should arrive.

Delay followed, and on the 8th of July the plaintiffs wrote again to the defendant, referring to his last letter, and requested a reply by return mail in explanation of the delay to deliver the logwood. None appeared to have been sent until the 23d of September following, when the defendant wrote to the plaintiffs that he was prepared to deliver the logwood, and requested them to state on what wharf they would have it landed. Receiving no satisfactory reply to their letter of the 8th of July, the plaintiffs on the following day commenced the present action, claiming damages for the non-fulfilment of the contract.

*Thurston, Ripley, & Co.* for plaintiffs.

*Edmund Burke* for defendant.

CLIFFORD, J. Damages are claimed in the first count for the breach of the contract made on the 13th of May, 1869, for the delivery of two hundred tons of logwood in the month of June following; but the declaration contains a second count, in which the original contract is set forth according to its tenor and effect, and which contains the further allegation that the time for the delivery of the logwood was subsequently postponed, and the breach alleged is that the defendant did not deliver the same during the month of June, as stipulated between the parties in the form of the contract as modified; appended to the special counts are counts also for goods sold and delivered, and the common counts.

Argument to show that the defendant was guilty of a breach of his contract is unnecessary, as that is admitted. The only

question of much importance submitted to the court in the agreed statement being, whether the damages of the plaintiffs shall be assessed as of the 15th of February next after the date of the original contract, or as of the 30th of June of the same year. It is admitted by the defendant that he is liable for a breach of his contract, the only question being whether the damages shall be the difference between contract price and the market value of the logwood in February, 1869, or the June of the same year. Some doubts are expressed by the defendant whether the declaration is sufficient to warrant a judgment for the plaintiffs if the court adopts the first theory, which, as he contends, is the only theory the facts will sustain ; but the court is of the opinion that those doubts are without any foundation, as the agreed statement in terms submits that question to the determination of the court.

Objections to the form of the action are usually considered as waived, by submitting the case to the decision of the court upon an agreed statement of facts, unless such objections are expressly reserved for the consideration of the tribunal to which the submission is made. *Ellsworth v. Brewer*, 11 Pick. 318 ; *Kimball v. Preston*, 2 Gray, 567 ; *Scudder v. Worster et als.*, 11 Cush. 574.

But it is not necessary to resort to that well-settled rule of practice in this case, because it is expressly stipulated between the parties that the question for the determination of the court is whether the damages shall be computed as of the date first mentioned, or of the second date, which is all that need be said upon the subject.

Suppose that is so, then the defendant admits that he is liable in damages for the difference between the contract price of the logwood and the market price of the article on the 15th of February, when he contracted to deliver it to the plaintiffs. Large damages, however, are claimed by the plaintiffs, as the market price of the article increased before the 30th of June in the same year, when, as they contend, the breach of contract actually took place.

Their theory is, that the time for the delivery was extended,



by mutual consent of the parties, from the 15th of February to the 30th of June, as evidenced by the correspondence. Two answers are made by the defendant to that proposition: 1st. He contends that it amounts to a new contract, and that it cannot be supported as a new contract, as the letters composing the correspondence are without the requisite stamps. 2d. His second proposition is, that the theory is not supported by the true construction of the letters. 1st. Strong doubts are entertained whether letters of the kind are required to be stamped, as no one of them contains a contract; but the better answer to the objection in this case is, that the letters are not offered to prove a new contract, but only to show that the condition of the subsisting contract between the parties was waived; but if it were otherwise, the objection cannot prevail, as the act of Congress does not make the contract void for want of a stamp. Contracts not stamped are not admissible in evidence; but the objection in this case comes too late, as the letters without any objection or reservation of any kind are annexed to and made a part of the statement of facts, and must therefore be considered as before the court by the consent of both parties, as evidence in the case.

Before discussing the second question, it may be important to inquire whether the act of defendant in paying money into court admits the claim of the plaintiffs, as set forth in his second special count. It appears that the defendant, at the return term, under the common rule, paid \$400 into court, and the plaintiffs, four days before the agreed statement of facts was signed, took the same out of court.

Serious question would arise if the writ contained only the special count, alleging the breach in June, whether that payment into court, under the common rule, did not admit the breach as alleged, and entitle the plaintiffs to a judgment on that count.

Besides the special counts, however, the declaration contains a general count of *indebitatus assumpsit*, and the common counts in such a case. The better opinion, as tested by more recent authorities, is, that the payment of money into court is not an

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admission of all the counts in the declaration. Where there is a count on a special contract, together with the general *indebitatus* counts, the payment of money, generally upon the whole declaration, says Phillips, is an admission of the defendant's liability upon the special count, and there are other authorities to the same effect. 1 Phil. Ev. 4, Am. Ed. by Edwards, 788; *Jones v. Hoar*, 5 Pick. 290; *Huntington v. American Bank*, 6 Pick. 847.

Undoubtedly the rule is so where a special cause of action only is set out in the declaration; but the rule is now well settled otherwise, where the declaration, as in the present case, contains the general counts in addition to a special count which may include many causes of action, as the defendant in such cases, by payment of money into court, does not admit any specific contract, the only effect being that he admits a liability on some one or more of the causes of action set out in the declaration, not exceeding the amount paid into court. *Hubbard v. Knous*, 7 Cush. 557.

Repeated decisions have established that rule both in England and in this country. *Kingman v. Robins*, 5 Mees. & Welsb. 94; *Archer v. English*, 1 Man. & Gr. 691; *Story v. Finnis*, 6 Welsb.; *Hurlst v. Gord*, 123. Evidently, therefore, the case must depend upon the legal effect of the letters given in evidence, as the agreed statement confers no authority upon the court to draw any other inferences than such as their language imports. Weighed in that light, I am of the opinion that those letters do not establish a mutual agreement between the parties to extend the time of delivery, as alleged in the plaintiffs' declaration.

Coming to the correspondence, the defendant, in his letter of May 13, states to the effect that he has two small vessels at Jamaica, one hundred and sixty tons each, that should be here next month, and that he has ordered his brother to load them with logwood at any price, "therefore I want you to await their arrival, when the first shall be delivered to you"; adding, "Sooner or later you will get your two hundred tons of logwood." Such language cannot be construed into an absolute promise or statement that the vessels would arrive in June, nor

that the two hundred tons of logwood would be delivered in June, but only that he confidently expected that the vessels would arrive in June, and that the plaintiffs, on their arrival, should have their contract filled, as originally promised. Grant all that, still the suggestion is, that the plaintiffs understood the matter differently, and reference is made to their letter as proving that suggestion, and it must be admitted that its tendency is that way, as they say in their reply, "Yours is received, advising you are to have two cargoes of logwood from Jamaica next month, and proposing to fill our contract from these vessels. We accept the proposition, and will thank you to advise the arrival of the vessels, when we will promptly give" the necessary directions.

It is an undeniable principle of the law of contracts that an offer of a bargain from one person to another imposes no obligation upon the former unless it is accepted by the latter according to the terms in which the offer was made; any qualification of or departure from those terms invalidates the offer, unless the same be agreed to by the person who made it; until the terms of the agreement have received the assent of both parties the negotiation is open, and imposes no obligation upon either. *Elliason v. Henshaw*, 4 Wheat. 228.

Beyond all doubt the reply of the plaintiffs to the offer made by the defendant is a wide departure from the proposition tendered by the latter, and it is quite probable that the modification of the proposition offered was made for the purpose of securing better terms than those proposed by the defendant in his letter; but the insuperable difficulty in the plaintiffs' case is, that the agreed statement does not show that the suggested modification of the offer was ever accepted by the defendant; and the rule is that until the terms of the agreement have received the assent of both parties, the negotiation is open. Taken as made, the offer was never accepted by the plaintiffs; and there is no evidence whatever to show that the defendant ever accepted the modification suggested by the plaintiffs, but both parties suffered the matter to drop without completing any new arrangement, so that the question must turn upon the construction of the first

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letter of the defendant; and in respect to that, it is clear that he did not make an absolute offer to deliver the logwood in June, as assumed in the declaration. All he did was to express a confident opinion that the vessels would arrive in June, and promised to the effect that the plaintiffs should have their logwood from the first cargo; but they never accepted those terms, and the matter was suffered to drop without any new arrangement having been accepted. Tested by these views, it is clear that the plaintiffs are entitled to recover as damages the difference between the contract price of the logwood and the market value of the same on the 15th of February, at the time the defendant stipulated to deliver the same in the original contract.

Hearing if necessary as to judgment.

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## NOVEMBER TERM, 1867.

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### LUCINDA JAMES, Administratrix of CHARLES T. JAMES, v. ATLANTIC DELAINE COMPANY *et als.*\*

The treasurer of the corporation, respondent, furnished to the assignee in insolvency of the complainant an incorrect and untrue statement of the account between them and the complainant, by which the assignee was induced to entertain a proposition to withdraw a suit of the complainant against the corporation, and which resulted in the execution of mutual releases between the assignee and the corporation in respect to all the interest of the complainant. The complainant never assented to the proposition or the settlement, but they were procured with his assignee, by the false statement of the accounts by the treasurer of the corporation. *Held*, that the complainant was entitled to a decree, according to the prayer of the bill, unless the corporation had other defences which could be sustained.

The settlement being prejudicial to the complainant, the assignor, he was entitled to the residue of his estate, if any, in the hands of the corporation, after his debts outstanding at the date of the assignment were paid.

By the extinguishment of the debts the assignee became the trustee of the complainant, and the latter became clothed with all the rights and powers of *cestui que trust*, to the same extent as the creditors previously had whose claims he had extinguished.

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\* This case is inserted at this place because of its connection with the following one.

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The complainant was the proper party to come into a Court of Equity and pursue the trust estate, it appearing that it had been improperly parted with by the trustee. When the objects of the trust are fulfilled, equity will compel a conveyance to the *cestui que trust*, he being the sole beneficiary.

BILL in Equity praying that a release given by the assignee in insolvency of the complainant to the corporation respondent, might be declared void, and that it might be set aside as having been obtained by fraudulent representations and concealments, and for certain other specific relief.

The original complainant, on the 1st of January, 1851, entered into a contract with certain persons therein named to erect certain buildings of certain prescribed dimensions adapted to the purpose of a factory for the manufacture of delaines. The terms of the contract required that the other contracting parties should furnish the land for the site, and that they should pay to the complainant for the materials to be furnished by him in erecting the mills and supplying them with machinery, and for his services, the sum of \$260,000 in certain instalments, as therein provided. The conditions of the instrument required the complainant to complete the works by the 1st of August following, and the stipulation was that he should take the general charge of the mills for the term of two years from the date of the contract. Progress was made in the works; but the parties, in May of that year, procured an act of incorporation and made a supplemental contract in which the original complainant agreed that the respondent corporation might assume the entire obligations of those who had contracted with him, and that he would proceed to complete the contract as if it had been originally made with the respondent corporation, and stipulated to discharge the individual parties from all liability, except as stockholders of the company. It was conceded that the company was duly organized with a capital stock of \$300,000, divided into shares of \$1,000 each, and the record shows that the complainant subscribed for one half of the amount of the capital stock. Unable to complete the undertaking without a loan, the complainant, on the 1st of August, in the same year, borrowed of the other contracting parties the sum of \$75,000 to carry on the work, and as security

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for the payment of the same, gave them a mortgage of that date of his homestead and other valuable real estate, and of all his interest in the respondent corporation, and of other rights and interests. They made the advance, but it was not sufficient to enable him to complete the undertaking, and on the 2d of September of that year he made an assignment of all his estate, real and personal and mixed, in trust for his creditors. Due conveyances of the same were accordingly executed, but the terms of the instrument empowered and required the assignee to complete the contract with the respondent corporation. Pursuant to that authority and requirement the assignee completed the buildings and put the mill in operation, and proceeded to execute the other trusts created under the instrument of assignment. The clear inference from the record was, that the factory, including the buildings and machinery, was completed by the assignee under the provisions giving that authority in the instrument of assignment, and it did not appear that the respondent corporation made any objections to the acceptance of the works when the same were ready for delivery.

Efforts were made by the complainant to raise money to pay his debts, and to secure a reconveyance of the property, rights, and credits assigned and mortgaged, and as a means of promoting that object he requested the treasurer of the respondent corporation to furnish him with a statement of the company's accounts with his estate, with a view to the settlement of the same; but the treasurer of the company refused to furnish any such statement, and the complainant, as he alleged, was thereby prevented from procuring the necessary means for that purpose. An attempt was also made by the treasurer of the company, under a power contained in the mortgage, to sell the homestead and other separate property of the complainant, mortgaged to secure the loan; but the allegation was that the company and their treasurer were prevented from so doing by a writ of injunction issued from the State Court. Enjoined from selling the interest of the complainant, the charge was that the respondent corporation and their treasurer instituted other means to secure the absolute control of his stock, and to accomplish the same end. Being enjoined not to sell at the suit

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of the assignee, and being again requested to furnish a true statement of the accounts, their treasurer furnished a statement to the assignee. The material charge of the bill of complaint was, that the statement so furnished was incorrect and untrue, and that it was so made and rendered with intent to deceive and defraud the assignee; and that the assignee was thereby deceived as to the true state of their accounts; and that he was thereby induced to entertain a proposition which resulted in the withdrawal of the injunction suit, and in the execution of mutual releases between him as such assignee and the respondent corporation in respect to the entire interest of the complainant in all the assigned and mortgaged property. The averment of the bill of complaint was, that the complainant never assented to the proposition or to the settlement, but that the same was influenced and procured by the false statement of the accounts between the parties, as rendered by the treasurer of the respondent corporation.

The principal issue between the parties grew out of the charge of fraudulent representation and concealment, which was expressly denied in the answer.

*J. H. Parsons, T. A. Jencks, Caleb Cushing*, for complainant.

*Abraham Payne, R. W. Greene*, for respondents.

CLIFFORD, J. Before proceeding to consider the merits of the issue, it becomes necessary to determine the question as to the competency of certain witnesses examined by the respondents.

Two depositions, to wit, that of George W. Chapin and that of Lyman B. Frieze, offered by the respondents, are objected to by the complainant, because they are parties to the suit. They were both taken (as now offered) subsequent to the passage of the Act of the 3d of March, 1865, which provides that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. 13 Stat. at Large, 538. The original complainant died in October, 1862, intestate, as appears



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by the record. Tested by the foregoing provision alone, it is quite clear that the deponents are not competent witnesses to testify against the present complainant as to any transaction with or statement by her intestate, as they were not called to testify by the opposite party, nor required to testify by the court. Application for such an order was never made to the court, and none such was ever passed in the case. None of the prior proceedings have any effect to take the two depositions out of the operation of that provision of law. Both of the deponents gave depositions in the case before the first hearing upon the merits. They were taken at that time also by the respondents upon the ground that the practice of the State Courts furnished the rule of decision; but they were stricken out by the order of the court before the hearing, because parties, except in certain special cases, were not, under the general rules of equity law, competent witnesses in suits in equity, as previously decided by this court. Subsequently the parties were heard, and the case was held under advisement; but the court, at the June term, ordered that the same should be reargued, and thereupon it was ordered, upon motion and consent of parties, that the time for taking further testimony be extended to the 1st of November, in the same year. In the mean time the complainant died, and the cause being revived, the time for taking testimony was extended from time to time, until the 1st of April, 1865, as appears in the supplemental record. Suffice it to say, that both of these depositions were taken subsequent to the Act of the 3d of March, 1865, and the question of the competency of the deponents is controlled by that provision.

Any restatement of the facts proved, except to a limited extent, is unnecessary, as they are succinctly stated in the narrative of the case. The execution of the contract and of the mortgage is admitted, and there is no controversy as to the deed of assignment and the appointment of the assignee in insolvency. Satisfactory proof, also, is exhibited that he completed the contract, and that the buildings and machinery were accepted by the other contracting parties. The respondents admit that the mutual releases as between the company and the assignee, as set

forth in the bill of complaint, were duly executed. The effect of these several instruments was, that the entire interest of the original complainant in the company property and in the capital stock, and his entire interest in the mortgaged estate, passed into the hands of the respondent corporation. Mention is not made of the fact that the mortgage was executed to the treasurer of the company, as it is not controverted that he held it as trustee for the company. The corporation respondents claimed a lien upon the stock held by the original complainant, under the provisions of their charter; and it is fully proved that their treasurer in February, 1853, advertised the other mortgaged property for sale, and that they were prevented from carrying out their intention by the injunction suit prosecuted by the assignee. They also claimed damages for the delay in completion of the contract, but the original complainant claimed a much larger sum for moneys expended in extra work not included in the contract.

Full proof is also exhibited that the treasurer of the respondent corporation was several times requested to furnish a true statement of the accounts between the parties, and that the only one he ever did present deserving the name is the one he presented, or caused to be presented, to the assignee, and which was used as the basis of the computations at the date of the settlement. Beyond question, that statement was inaccurate in large amounts, and greatly so to the prejudice of the original complainant.

Viewed in every aspect, it is the conclusion of the court, not only that it was false, but that it was furnished with the intent to deceive and defraud, by promoting a settlement prejudicial to the original complainant, and more favorable to the respondent corporation than truth and justice would admit. Such being the views of the court, it is clear that the complainant is entitled to a decree, unless some one or more of the defences can be sustained.

The settled rule of law is, that the assignor in such a case is entitled to the residue of the estate, after his debts outstanding at the date of the assignment, are paid. *Halsey v. Whitney*, 4 Mas. 222; *Brashear v. West*, 7 Pet. 608. By the extinguish-

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ment of the debts, the assignee became the trustee of the complainant; and the latter, as the assignor, became clothed with all the rights and powers of a *cestui que trust* to the same extent as the creditors previously had whose claims he had extinguished. *Lazarus v. Ins. Co.*, 5 Pick. 81. Consequently the complainant was the proper party to come into a Court of Equity, and pursue the trust estate, it appearing that it had been fraudulently or improperly parted with by the trustee. Story, Eq. P., § 221; *Oliver v. Piatt*, 8 How. 400; Lewin on Trusts, 780; *Hovendell v. Annesley*, 2 Sch. & Lef. 633.

Where the purposes of the trust have been satisfied, equity in a proper case will compel a conveyance from the trustee to *cestui que trust*, as he has the sole beneficial interest.

The argument for the respondent is that these principles cannot apply in this case, because it appears that two of the debts of the original complainant have not been paid. Much weight would be given to that objection as between the assignor and assignee, if the estate continued in the latter, and he was still engaged in executing the trust; but when it appears that the trust property has been fraudulently or improperly conveyed to another, not as a means of executing, but as a means of extinguishing the reversionary interest of the assignor, the objection cannot be sustained. The rights of such creditors in such a case will be protected in the decree granting relief. Want of diligence in the institution of the suit is another defence much pressed in the argument. The record shows that the mutual releases were executed on the 2d of March, 1853; and the bill of complaint was filed on the 1st of March, 1859, before the claim was barred by the Statute of Limitations. But the argument is, that staleness of claim is often admitted in equity as a good answer to a bill of complaint, when the period which has elapsed is less than the time required as a legal bar to a common-law suit, and the proposition is correct, as was held by this court, and has since been affirmed in the Supreme Court. *Badger v. Badger*, 2 Wall. 94. The correctness of that rule, properly applied, cannot be doubted, but it is equally clear that it should seldom or never be applied in cases of trust, where the means of knowledge are wholly or

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even chiefly on one side. When the fraud charged and proved consists of misrepresentations and concealments, Courts of Equity are reluctant to apply the rule at all, unless it appear that the rights of innocent third parties will be injuriously affected if that defence is overruled. The affairs of the complainant had become much complicated, and the evidence shows that the mutual releases were executed without his consent and against his wishes. He lost by the arrangement, not only all claim to the possession or control of the property, but all direct means of consulting the books and papers containing the evidence of his rights. Looking at the circumstances of the case, I am clearly of the opinion that it is one where equity will apply that rule. *Provost v. Gratz*, 6 Wheat. 481; *Michoud v. Girod*, 4 How. 503; *Baker v. Whiing*, 8 Sum. 486; 2 Story, Eq. Jur. §§ 15, 20.

The details of the evidence have purposely been avoided, as the case is one, if the decree be for the complainant, which must go to a master, where further testimony may be taken as to amounts.

The conclusion of the court is, that the complainant is entitled to a decree; that the release of March 2, 1853, given by the assignee to the respondent corporation, is void, and that the same be set aside as having been obtained by fraudulent representation and concealment; and also to a decree for an account, including an account of all assigned and mortgaged property, subject to the payment of the debts, if any, due to the creditors of the assignor, as secured in the instrument of assignment, reserving all further orders or decrees as for other specific relief or otherwise, until the true state of the accounts is fully ascertained.

Decree accordingly, and the case must be referred to a master, to state the account for the consideration of the court.

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JUNE TERM, 1873.

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LUCINDA JAMES, Administratrix, in Equity, v. THE ATLANTIC DELAINE COMPANY *et als.*

BEFORE CLIFFORD AND KNOWLES, JJ.

The complainant agreed with certain firms to construct and put in operation a factory.

To obtain and secure a loan of money from these firms, he executed a mortgage, with power of sale for breach of condition, to the treasurer of the company, as trustee for the corporation, upon all his stock and interest in the company. He also executed to the same firm, as trustee of the lenders of the credit, separate mortgages of the same kind upon his homestead and farm, together with other property. Subsequently failing, he made an assignment of his property. By the terms of the assignment the liability to the company was made a charge upon the assets named in the assignment, with directions to the assignee to apply all the assigned estate, as he could, to the fulfilment of the contract of the assignor for the building and equipment of the mill. The assignee made an arrangement with the company to furnish the money to forward the contract of the assignor, and charge the same to the assets in his hands. Under this arrangement the factory was completed. The assignor continuing embarrassed, the trustee was directed to advertise the properties for sale. The assignee failing to raise the amount necessary to meet the assignor's liabilities, wrote to the treasurer of the company demanding a statement of the condition of the company, so that he could represent the assignor's stock in its true light and sell it for its true value. The trustee stated that such an account could not be given, and the assignee then obtained an injunction restraining the proposed sale of the stocks until the further order of the court. Certain of the mortgagor's creditors tendered to the company the amount of the mortgage debt which the company refused to accept, and the court passed an order enjoining the sale unless the trustee would file a stipulation not to enforce the mortgage against property subject to the lien of the complainant in that suit. Two suits were pending to redeem the properties mortgaged, and the order restraining the sale of the stock was in force when the sale of the homestead took place. On that day the trustee sent to the assignee a paper described as a statement of the company's affairs. He afterwards on oath acknowledged that it was transcribed from a private memorandum kept by him, and it nowhere appeared on the company's books. *Held*: That being furnished as a copy from the company's books, it must be assumed that the assignee received it as an official account and gave it full credence as furnished by the company's officers.

That the alleged statement was not only false, but furnished with intent to deceive and defraud by promoting a settlement prejudicial to the mortgagor and more favorable to the company than truth and justice would admit.

That in such case the assignor is entitled to take the residue of the estate after his debts outstanding at the date of the assignment are paid.

That by the extinguishment of the debts the assignee became the trustee of the assignor, and the latter clothed with all the rights of *cestui que trust* to the same extent as the

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creditors previously had been whose debts he had extinguished ; and consequently the complainant could come into a Court of Equity and pursue the trust estate, it having been fraudulently or improperly parted with by the trustee, and that under the decretal order the complainant was entitled to redeem the mortgaged property just as her intestate might have done, if the settlement and release had never been executed.

This case was twice referred to a master, but inasmuch as the exceptions which accompanied the respective reports made it necessary, if attempting to decide the case at this stage, for the court to adjudicate the whole controversy as if no reference had been made, the court again sent the whole case to the master with specific instructions for a statement of the accounts between the parties.

**EXCEPTIONS to master's report recommitted, supplemental report and exceptions to supplemental report.\***

Certain mercantile firms, desirous of engaging in the manufacture of fabrics known as delaines, contracted with the original complainant to construct a factory for the purpose, and to put the same in operation, as he was known to possess great skill and experience in such enterprises, as well in the choice of sites and making the necessary erections, as in the selection of machinery and putting the same in operation.

Five firms entered into an association for the purpose before they were incorporated, and to accomplish the object they agreed to create a stock of three hundred shares of \$1000 each ; and it appeared that the complainant became the subscriber for one half the amount, and that they also contracted with him to build and equip the mill and put it in operation for the sum of \$260,000. He made that contract on the 1st of January, 1851, prior to the passage of the act incorporating the company, which became a law at the next session of the Legislature of the State, which convened in May following. Slight alterations were made in the contract by mutual consent subsequent to the act of incorporation, and on the 1st of August of the same year, the complainant associated with him his son-in-law as a contractor, and the incorporated company assumed the entire obligations of the contract as the other contracting party. Application was made at the same time by the complainant to the five firms whose members subscribed for the other half of the stock of the company, for a

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\* The first opinion delivered in this case by Judge CLIFFORD may be found *ante* p. 614.

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loan of \$75,000, and it appears that they advanced him the amount for which he applied by signing accommodation notes and by accepting his drafts, and that he gave them satisfactory security for the loan in a mortgage executed to the treasurer of the company, as trustee for the corporation, which made the advances, including in the instrument all his interest in the stock and property of the company. He also executed to the same person, as trustee of the lenders of the credit, separate mortgages of his homestead in the city of Providence, and of his farm in the town of Scituate, together with certain bonds and notes of a Western corporation. Though he obtained the pecuniary assistance for which he applied, yet it was not sufficient for the purpose, and on the 2d of September of the same year he failed in business, and made an assignment of all his property of every name and description to an assignee. His assets consisted of the several properties described in that mortgage, and of the other real and personal property, stock and promissory notes specified in the schedule annexed to the second deposition of the assignee, as exhibited in the record. By the terms of the instrument, he made his liability under the contract with the company for building and equipping the mill, a charge upon the assets specified in the assignment, and directed the assignee to apply all the assigned estate, as the same should come to his hands, to the fulfilment of that contract so far as the same was necessary to build and equip the mill and put the same in operation.

Due acceptance of the trust was made by the assignee; but he soon found that means to carry forward the work could not be raised fast enough by converting the assigned property into money; and to obviate that difficulty he made an arrangement with the company, through their treasurer, to supply the deficiency, and to charge the same to the assets in his hands. Advances were made by the treasurer under that arrangement, as claimed by the respondents, to the amount of \$53,814, and it appeared that the assignee completed and equipped the mill early in February, subsequent to his appointment, and that the mill with its machinery was delivered to the company in the course of that month. Success ultimately attended the enterprise; but the



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contractor, through whose skill and experience it was originated and put in operation, continued to be embarrassed, always claiming, however, that he would be able in time to meet his liabilities, and that the property mortgaged to the company would revert to him under circumstances which would enable him to save a large portion of his estate. Negotiations to that end were instituted early in that season, and were continued throughout the year, but they resulted in nothing of value to either party. Power to sell for breaches of condition was conferred upon the mortgagee or trustee in each of the mortgaged deeds, and it appeared that the person for whose benefit the respective mortgages were given directed the trustee to advertise the several properties for sale under that power, it being understood by the moving party that the mortgaged properties, other than the stock of the complainant in the company, should all be first sold and applied to discharge the mortgage debts. All of the advertisements bore date the 5th of February, but the respective sales were appointed for different days, the last of which, to wit, the sale of the homestead and of the stock held by the complainant in the company, for the 26th of that month, which was near the close of a short session of Congress, and at a time when the assignor of the several properties was a Senator in Congress, and under the obligation of official duty to attend the daily sessions of the Senate. Differences of opinion existed between the parties as to the amount due from the mortgagor to the company, but it was known to the assignee that the sale of the Warwick farm and other collateral securities had reduced the original mortgage debt to \$52,000, and that he could have the contemplated sales postponed if he could raise that sum, as the disputed amounts were under arbitration; and if the corporation had any claim against him as assignee, they could enforce it by their charter lien, or in due course of legal proceedings. Efforts of various kinds were made to raise the necessary amount; but the assignee, finding it impossible to do so, in the absence of his assignor, on the 15th of February addressed a written communication to the treasurer of the company, and demanded "a statement of the condition, standing, and accounts of the company," so that he

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might be able to represent the stock advertised to be sold in its true light, "and make it sell for what it was worth."

Instead of complying with that demand, the trustee called upon the assignee to convince him that such an account could not be made at that time, and he professed to believe that the assignee was satisfied with his explanations; but it was evident that he was under a mistake, as it appeared that, failing to obtain the required statement, he instituted a suit in equity in the State Court against the trustee to enjoin the proposed sales of the several properties, and that the court, no satisfactory accounts having been rendered, enjoined the sale of the stock until the further order of the court. Proceedings to accomplish the same object were also instituted by certain creditors of the mortgagor having a lien upon the Scituate farm, in the course of which the creditors tendered to the company the amount of the mortgage debt, which the company refused to accept; and the court passed an order enjoining the sale, unless the trustee would file a stipulation not to enforce the mortgage against the property subject to the lien of the complainant in that suit. Efforts were made by the assignee to prevent the sale of the homestead, but without success, because it appeared that the sale was made at the time specified in the advertisement prepared and published by the trustee. Two days before the sale of the homestead, the assignee informed the mortgagor that he had succeeded in stopping the sale of the stocks, but that the application for an injunction as to the sale of the other properties had been denied; and it appeared that it was on the very day that the sale of the homestead took place that he gave to his assignee a full description of the nature of the efforts he had made to prevent the consummation of that design. Such a statement as that demanded was not furnished during the controversy growing out of the application to enjoin the proposed sales, and the letter of the assignee addressed to the assignor on the day of the sale, furnished no evidence that negotiations were pending for a settlement, or for a transfer of the equities of redemption. Two suits were pending to redeem the properties mortgaged, and the order of the State Court restraining the sale of the stock was in full force when the

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sale of the homestead took place. Both of these parties were in some respects the representatives of the original owner of the property, and as such were bound to good faith in their dealings with the same; but they were pursuing opposite aims, as the trustee was endeavoring to effect a sale of the mortgaged properties, and the assignee was exerting all his power to prevent the accomplishment of that object. Nothing occurred to change these relations prior to the sale of the homestead; but it appeared that the trustee on the same day addressed a letter to the assignee, enclosing a paper which he described "as a statement of the affairs of our company," without making any reference to the fact that the assignee had ten or twelve days before demanded of him a statement of the condition, standing, and accounts of the company, which he had neglected and refused to furnish. A similar request had previously been made and refused, and the charge was, that the statement as furnished was incorrect and untrue, and that it was so made and rendered with intent to deceive and defraud the assignee, and that the assignee was thereby deceived as to the true state of the accounts, and that he was thereby induced to entertain a proposition which resulted in a withdrawal of the injunction suit and in the execution of mutual releases between him as such assignee and the respondent corporation, in respect to the entire interest of the complainant in all the assigned and mortgaged property.

In a prior opinion in the same case, the court ordered a decree referring the same to a master.\* By that order the court set aside the instrument of release and settlement executed by the assignee of the original complainant to the treasurer of the corporation respondents, and adjudged and decreed that the same were void, as having been obtained by the assignee by fraudulent representations and concealment. Such an adjudication entitling the complainant to relief, the court sent the cause to a master to take an account of all the dealings between the original complainant and his assignee and the respondent company or their treasurer, including an account of all assigned and mortgaged prop-

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\* *Ante* p. 621.

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erty held by the original complainant, and by him assigned and mortgaged to those parties, or which passed or came into the hands, possession, or control of the respondent company or their treasurer under the operation of the said instruments of settlement and release, and in any other manner subject to the payment of the debts, if any, due to the creditors of the original complainant, as secured by the instrument of assignment.

Pursuant to that decretal order, the master gave notice and heard the parties, and on the 10th of December, 1870, made his report to the court, annexed to which were the exceptions of the parties to the finding of the master; and the court, having heard the case upon the exceptions to the master's report, passed an order that the report be recommitted to the master with instructions that he append to it a supplemental report comprising two summary statements, showing, first, the result to which he came under the theory of accounting first adopted on motion of the complainant; secondly, showing the result to which he came under the second theory, which he adopted at the suggestion of the respondents, reserving the exceptions filed by each party, and giving to each party the right to except to the supplemental report.

Enough was done under that order to constitute, as the master supposed, a compliance with these instructions, and he accordingly, on the 20th of June, 1872, made a supplemental report which appeared in the record. Prior to the hearing upon the exceptions to the master's report, the respondents filed a petition for a rehearing of the case upon the merits, but they withdrew the same at the suggestion of the court that the application was premature when the hearing was asked upon the exceptions, it being understood that the withdrawal was without prejudice to the right to renew it at the proper time. On the 19th of August, 1872, the master filed his supplemental report, to which were annexed the exceptions of the respective parties; and on the 3d of September following the respondents filed their petition for leave to review the original decretal order. Sufficient appeared in the original record to satisfy the court that the exhibit made by the treasurer of the company to the assignee

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as the basis of the settlement between the parties was erroneous and false; and the court accordingly found that the settlement and release executed by the assignee of the original complainant were obtained by fraudulent representations and concealment.

Certain statements appeared in the original report of the master which tended to show that the court erred in that finding of fact. Such also were the views of the respondents; and it appeared that they, in pursuance thereof, on the 3d of September in the same year, renewed their application for a review of the original case, insisting that the decretal order was for the wrong party; and it also appeared that the court, in view of the statements contained in the report of the master, tending to show that the court erred in the said finding, passed an order granting a rehearing "as to that fact," and gave leave to each party to take further proof on the question whether the statement of the accounts furnished by the treasurer of the corporation to the assignee, was or was not false, as found by the court.

Proofs were taken by both parties under that order, and the cause, on the 23d of October following, came to hearing upon the proofs exhibited and the exceptions of the respective parties to the supplemental report of the master.

*Jas. H. Parsons, Thos. A. Jenckes, and Caleb Cushing* for complainants.

*A. Payne, R. W. Greene, and B. R. Curtis* for respondents.

CLIFFORD, J. Questions of considerable difficulty are presented in the case, which arise out of the application for a review, and others arise upon the exceptions filed by the respective parties both to the original and supplemental reports of the master, all of which are still open for consideration, as it was not intended that any of them, except the one withdrawn by the complainant, should be superseded by any subsequent order in the cause. Before attempting to examine the several exceptions to the master's report, it becomes necessary to decide whether the view of the court as embodied in the decretal order is correct, as that presents a preliminary question which, if decided in favor of the respondents, will terminate the controversy.

Coming to the application for review, the question is, whether

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the statement of the accounts furnished by the treasurer of the corporation to the assignee of the original complainant was or was not false, as found by the court in the opinion delivered at the time the decretal order was entered. Aid in solving the questions presented will be derived from a proper understanding of the exact relations which the parties sustained to each other in the original transactions, out of which the controversy has arisen; and for that purpose it will be necessary to refer very briefly to the original record, as those relations commenced in an enterprise which originated even before the respondent company was incorporated.

[At this point the court recited the facts substantially as they appear in the statement.]

Facts and circumstances were introduced at the original hearing sufficient to satisfy the court that the charge made in the bill of complaint was true, and the court accordingly entered the decretal order, which is the subject of complaint in the application for a rehearing.

Having carefully weighed the facts and circumstances introduced in evidence, the court came to the conclusion that the release given by the assignee to the company was void, and adjudged and decreed that the same be set aside as having been obtained by fraudulent representations and concealments. Certain suggestions were made at the recent argument to the effect that the exhibit in question was not properly before the court at the final hearing, when the decretal order under revision was entered; but it cannot be necessary to consume time in discussing that proposition, as the record is full of evidence to refute it, and to show that both parties, as well as the court, treated it as a most material part of the proofs of the case. Undoubtedly it first came into the case as an exhibit to the deposition of the treasurer of the company, and it is equally true that certain portions of his deposition were excluded as unauthorized at that time by the acts of Congress; but the record shows that the time for taking proofs was subsequently enlarged, which enabled the respondents to retake that deposition and some others which had been excluded under the same ruling, Congress having in the

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mean time made parties competent witnesses in equity suits as well as in actions at law. Nor is there any doubt entertained that the decision was correct upon the evidence then before the court in entering the decretal order. Much discussion on that topic is unnecessary, as the proposition is scarcely denied.

Suppose that it is so, still it is insisted that the new evidence taken under the recent leave granted for that purpose is sufficient to show that the finding of the court was erroneous; but the court is not able to concur in that view. Instead of that the new evidence convinces the court that the original decision was correct, and that the release executed by the assignee was properly set aside, as having been obtained by fraudulent representations and concealment. Considerable embarrassment, it must be confessed, was experienced in conducting the original investigation, as the books of the company were not before the court; but the facts and circumstances adduced in evidence were amply sufficient to convince the court that the account exhibited was not an official account made by the company or by its managers, and that it was not an account copied from any official statement of the affairs of the company in respect to its dealings with the original complainant. All doubt upon the subject is now removed, as the party who furnished it to the assignee, as the basis of the settlement, confesses under oath that it was transcribed from a private memorandum kept by him, and that it nowhere appears on the books of the company as an exhibit of their affairs, which, of itself, in view of the circumstances attending the settlement and transfer, is sufficient to justify the finding of the court, as it falsely purports to be "a true copy from the books." Reference to the charter will show that the annual meetings of the company were required to be held on the first Wednesday of February in each year, and the by-laws require that the directors at each annual meeting should give a summary account of their management to the company for the preceding year, and at all other times when required by the stockholders representing one third of the capital stock. Apart from that it was also made the duty of the treasurer to render to the directors semi-annually an account of the affairs of the



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company, and at all other times when required, and at each annual meeting to exhibit his account to the corporation. Inasmuch as this statement was furnished as a true copy from the books, it must be assumed that the assignee received it as an official account, made under the obligation of law and of the contract between the parties to which it related, and that he gave it full credence as an official exhibit made by the proper officers of the company in the performance of their appropriate duties.

Nothing of the kind, however, appears on any of the books, and the party who furnished it testifies under oath that "it came from my private letter book." Items of large amount were included in the statement, which do not appear in the books at all, and some of those which do appear are erroneous in large amounts, as is evident from the proofs exhibited in the record, thus fully justifying the remark of the court in the former opinion that the statement was inaccurate in large amounts and greatly to the prejudice of the original complainant. Viewed in every aspect, it is the conclusion of the court, not only that it was false, but that it was furnished with the intent to deceive and defraud by promoting a settlement prejudicial to the original complainant and more favorable to the respondent corporation than truth and justice would admit.

In such a case the settled rule is, that the assignor is entitled to take the residue of the estate after his debts outstanding at the date of the assignment are paid. *Halsey v. Whitney*, 4 Mas. 222; *Brashear v. West*, 7 Pet. 608.

By the extinguishment of the debts the assignee became the trustee of the assignor, and the latter became clothed with all the rights and powers of a *cestui que trust*, to the same extent as the creditors previously had been whose claims he had extinguished. *Lazarus v. Ins. Co.*, 5 Pick. 81. Consequently the original complainant was the proper party to come into a Court of Equity and pursue the trust estate, it appearing that it had been fraudulently or improperly parted with by the trustee. Story, Eq. Plea., § 221; *Oliver v. Piatt*, 3 How. 400; Lewin on Trusts, 730; *Hovendell v. Annesley*, 2 Sch. & Lef. 633.

Tested by these considerations, the court is of the opinion

that its finding as exhibited by the decretal order is correct, and that the original complainant was and is entitled to the relief therein adjudged and decreed. Renewed reference to the defences set up in the answer will not be necessary, as those matters were fully considered in the former opinion, to which reference is made as expressive of the present conclusions of the court. The complainant being thus entitled to relief, the only remaining question of much importance is, what is the proper measure of that relief, which is a question of great difficulty and embarrassment.

Twice the court has referred the case to a master, with a view to solve the difficulty and to discover the true theory of doing justice between the parties without complete success, since the exceptions which accompany the respective reports make it necessary for the Court to adjudicate the whole controversy to the same extent as if no reference had been made.

Separate examinations of the several exceptions under the circumstances will not be attempted, because it would extend the opinion to an unreasonable length without accomplishing anything of value to either party. Such an investigation would not serve any useful purpose, because neither the reports of the master, nor the exceptions, nor both combined, are of a character to enable the court to come to a satisfactory result without a further reference. Much has been accomplished by the master which will be of great value in the further investigation of the subject, and the criticism of the parties, exhibited in their exceptions, will also be of service in framing a new report; but the court is not able to deduce from the record in its present condition, without performing work which belongs to a master, such a result as the court is prepared to adopt as the final decree in the case.

Governed by these considerations, the court will send the whole case to the master, with more specific instructions for a new report, and for a statement of the accounts between the parties in respect to the mortgage debt. Under the decretal order the complainant is entitled to redeem the mortgaged property just as her intestate might have done if the settlement and release mentioned in the decretal order had never been exe-

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cuted. The release and settlement having been set aside, because obtained by fraudulent representations and concealment, it is clear that the complainant is entitled to have an account against the respondents as against mortgagees wrongfully in possession, including the net and annual profits of the property without being accountable for the losses of subsequent years. All sums due to the mortgagee will first be charged to the mortgaged estate, as ascertained from the agreements and actual dealings of the parties, whether advanced to the actual mortgagor or his assignee. Having ascertained the unpaid balance of the mortgage debt including interest to the present time, the master will next proceed to take an account of the net earnings of the mortgaged property, as against a mortgagee wrongfully in possession, deducting insurance, taxes, repairs, including ordinary improvements such as relate to the operative machinery and the motive power of the mill, and including all the net earnings subject to those deductions, whether actually declared as dividends or not, and however the same may have been expended or appropriated. Earnings of one year are not to be set off by the losses of a subsequent year, as the respondents are to be treated as mortgagees wrongfully in possession, but in ascertaining the earnings of a particular year, the losses of that year are to be deducted from the gross earnings in order to ascertain the net earnings of the year, as well as the cost of insurance, taxes, repairs, ordinary improvements, running expenses, and commissions. Shares of the stock paid, the complainant is entitled to recover in specie, but the complainant is not entitled to recover the thirty-seven shares never paid, as it cannot be said that those shares are wrongfully in the possession of the respondents. Nothing having been paid for the same, the court is of the opinion that no recovery can be had on account of those shares.

Estimates of earnings will be made on the basis of the shares paid, without including those not paid, and the master, on stating the accounts, will be governed by the principles herein laid down, and will deduct the amount of the unpaid mortgage debt from the amount of the earnings of the mortgaged property, adjusting interest to the present time, and state the exact amount

which the complainant is entitled to recover. Interest upon the total amount of profits earned prior to the date of the decretal order, will be computed from the date of that order to the completion of the report of the master. Profits earned subsequently to the date of the decretal order will only bear interest from the close of the last year included in that computation. Power is vested in the master to call for new accounts, and to hear the parties further if necessary, to enable him to state the account as required, and he will submit his draft report to them, as required by the rules.

# APPENDIX.

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## MAINE DISTRICT.

SEPTEMBER TERM, 1866.

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WM. STERLING *et als.*, Owners of the Brig William Nickels, Libellants, v. The Brig Jennie Cushman, WM. H. LEWIS, Claimant and Appellant.

The general rule is, that where a vessel is at anchor in a proper place, with no sails set, and another under sail collides with her and occasions injury to her, the vessel in motion is liable.

The harbor regulations of the harbor of Bangor require that no vessel shall come to anchor in the channel within certain limits; in this case it was found that the libellant's vessel was anchored in a proper place, had the proper light, and that her owners were entitled to recover of the respondents, in accordance with the decree of the District Court which was affirmed.

Inevitable accident in collision cases is never admitted as a defence, except when it is shown that neither vessel was in fault.

ADMIRALTY appeal in a cause of collision. The owners of the brig William Nickels exhibited their libel in the court below, against the brig Jennie Cushman, in a cause of collision, civil and maritime. The place of the collision was in the Penobscot River between Bangor Bridge and the north line of the town of Hampden. The libellants' brig arrived at Bangor during the night of September 7, 1865, with a load of white-oak timber, and anchored on the eastern side of the river, nearly opposite Tewksbury's shipyard. The next day, at the request

of the stevedore, she weighed anchor and dropped down the river about one hundred and fifty feet, where she again came to anchor for the purpose of discharging cargo. The stevedore stated that in changing her place of anchorage she was put in shore on the eastern side of the channel. The cargo was consigned to John T. Tewksbury, the owner of the wharf of that name on the Brewer side of the river; and he confirmed the statement of the stevedore that the vessel did not lie more than one third the way across the river from the Brewer shore. She drew, when loaded, twelve feet of water, and at low tide there was not more than seven feet of water where she lay. Unloading was continued through two days, during which the brig did not change her position.

The Jennie Cushman came up the river on the night of the second day during which the brig was unloading. When three miles below Bangor a steam-tug was employed to tow her into the harbor, and in coming in she struck the vessel of the libellants and caused the damage complained of.

None of the ship's company of the respondents' vessel were on board at the time of the collision except the master and two seamen, and they were below. At about nine o'clock in the evening, they set a light in the starboard rigging, ten or twelve feet above the deck, and the light burned brightly. The collision occurred between eleven and twelve o'clock at night; but it was a bright night, and the vessels had been in plain view of each other for a half-hour before it took place.

*James S. Rowe* for libellants.

*Charles P. Stetson* and *Shepley & Strout* for respondents.

CLIFFORD, J. Taken as a whole, the circumstances show to a demonstration that this was a case of fault and not of inevitable accident. Inevitable accident is never admitted as a good defence except when it appears that neither vessel was in fault, because if the vessel of the respondent was in fault, the libellant is entitled to recover, and if the vessel of the libellant is in fault then the libel should be dismissed; but if both were in fault, then the damages should be divided. *The Pennsylvania*, 24 How. 313; *James Gray*, 21 How. 194. The general rule is, that when a ship is at anchor in a proper place

or anchoring, and with no sails set, if another ship under sail collides with her and does her damage, the vessel in motion is liable. *The Batavier*, 2 W. Rob. 407; *The Scioto*, Daveis's 359; *Strout v. Foster*, 1 How. 89.

The appellants do not controvert that general rule, but insist that the evidence in the record shows that the case falls within the qualifications which are included in the rule. The harbor regulations of the port of Bangor provide that no vessel, steamboat, or raft shall be allowed to anchor or lie in the main channel of the river between the Bangor Bridge and the north line of Hampden, so as to obstruct the free passage of vessels, boats, or rafts up or down the river. The duty of the harbor-master is to board vessels as soon as practicable after their arrival, and to exhibit to the proper officer the regulations of the port, and, if necessary, to direct them where they shall lie. The argument of the appellant is that the vessel of the libellants was not anchored in a place allowed by the harbor regulations, but in a place where she obstructed the free passage of vessels up and down the river. But the harbor-master, and the owner of the wharf to whom the cargo was consigned, testified otherwise, and so do the master and all others on board the damaged vessel. They testify that she was on the Brewer side of the main channel, where at low tide the water was not more than seven feet deep. The witnesses examined by the appellants strongly support their theory, but after a careful examination of the whole evidence I concur with the District Judge that their testimony is not sufficient to overcome the facts and circumstances adduced by the libellants. Several other defences were set up by the respondents, but it is sufficient to say that no one of them is sustained by the evidence. Decree affirmed with costs.



## CHARGE OF CLIFFORD, J., TO THE JURY,

## In THE UNION SUGAR REFINERY v. MATTHIESSON &amp; Co., and final proceedings, November 13 and 14, 1865.

Inventions pertaining to machines may be divided into four classes.

1. Where the invention embraces the entire machine.
2. Where the invention embraces one or more of the elements of the machine but not the entire machine.
3. Where the invention embraces both a new element and a combination of elements previously known.
4. Where all the elements are old, and a new combination, producing a new result, is made out of them.

A person is an infringer of a patent of the first class who, without license, makes any portion of the machine ; of the second, when the part new and patented is made or used ; of the third class, when the new element or new combination is used ; of the fourth, when the patented combination is pirated.

The property of the inventor is the exclusive right which the letters-patent secure to him to make, use, and vend the thing patented.

The reason that a patent, when introduced in evidence, is *prima facie* evidence that the patentee is the first and original inventor of what is claimed therein, is that it is issued upon the adjudication of a public officer charged by law with such duty.

Where all the elements of a machine are old, the patentee cannot invoke the doctrine of equivalents to suppress all other improvements on the old machine.

But he is an infringer who makes or vends the patented improvement with no other change than the employment as a substitute for one of its elements, a device well known in the state of the art to be such at the date of the invention, and which any constructor acquainted with the art, would then know how to employ.

Such substitution of one well-known element for another is a mere colorable evasion of the patent.

Whether a witness has sworn falsely or not is a question for the jury, and if they find that he has wilfully sworn falsely as to a material fact, they may, if they deem it proper, disbelieve everything he has said.

The presumption that the patentee is the original and first inventor of what is claimed in the patent, when introduced in evidence, extends, in the absence of the original application no farther back than the date of the patent ; and those alleging an earlier date must prove it by competent evidence.

Where there is no evidence to the contrary, the presumption is that the patentee at the time of making his application for a patent believed himself to be the original inventor or discoverer of the thing patented.

Crude and imperfect experiments equivocal in their results, and then abandoned and given up, shall not be permitted to prevail against an original inventor who has perfected his improvement and obtained his patent.

It is not enough to defeat a patent to show that another had first conceived the possibility of effecting what the patentee accomplished, unless it appears that he reduced what he conceived to practice.

If two machines, having the same mode of operation, do the same work in substantially

the same way and accomplish substantially the same result, they are the same, though differing in form, shape, or name.

If the defendant's means of causing pressure at the nozzle of his machine were, at the date of the patentee's invention, known as a substitute for the means of causing pressure at the nozzle described in the patent in this case, and if this mode performed the same function as the patented one, and could from a constructor's knowledge be substituted for it, then the two means are substantially the same.

The patent in this case is not limited to any arbitrary mathematical amount of pressure, but covers such degree as is capable of carrying out the described object of the patentee under the conditions described in the patent.

**GENTLEMEN OF THE JURY :** — Pursuant to the uniform practice in this court, it now becomes my duty, as the organ of the court, to direct your attention to the nature of the controversy between these parties, as exhibited in the pleadings, and to give you such instructions in matter of law as seem to be applicable to the evidence in the case.

The action is an action on the case for an alleged infringement of certain letters-patent. The writ is dated the 16th of January, 1864; infringement is alleged on the 2d day of November, 1863, and from that time to the date of the writ. The plea is the general issue, with notices, under the statute, of certain special defences. The principal special defence relied on is that the assignor of the plaintiff is not the original and first inventor of the improvement described in the letters-patent on which the suit is founded. The claims of the plaintiffs, as laid in the declaration, rest upon two material allegations: First, that their assignor, Gustavus A. Jasper, is the original and first inventor of the improvement described in the patent on which the suit is founded; second, that the defendant, Francis O. Matthiesson, infringed the same as alleged in the declaration. Both of these allegations are denied by the defendant, and the issues presented in the affirmation and denial of these two allegations constitute the principal questions for your decision. They present mixed questions of law and fact, and consequently must be determined under the instructions of the court. Questions of law must be determined by the court, subject to revision by the Supreme Court on a writ of error; but questions of fact are for your determination, under the instructions of the court as to the rules of law properly applicable to the subject-matter involved in the inquiry.

Controversies like the present are exclusively cognizable in

the Circuit Courts of the United States; and the rights of the parties in such controversies are to be ascertained and determined according to the provisions of the acts of Congress upon this subject, and the rules and decisions established by the Federal courts. Power is conferred upon Congress, in the Constitution of the United States, to promote the progress of science and the useful arts by securing, for limited terms, to authors and inventors, the exclusive right to their respective writings and discoveries. Congress has accordingly legislated upon the subject. The existing Patent Act establishes the Patent Office, and provides for the appointment of a Commissioner of Patents, by the President, by and with the advice and consent of the Senate. Provision is made by § 6 of the act, “that any person or persons, having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, or composition of matter, not known or used by others before his or their discovery or invention thereof, and not at the time of his application for a patent in public use or on sale, with his consent or allowance, as the inventor or discoverer, and shall desire to obtain an exclusive property therein, may make application in writing to the Commissioner of Patents, expressing such desire, and the Commissioner, on due proceedings had, may grant a patent therefor.”

Protection is afforded, as you perceive, by that provision, to inventors of various kinds, but it will only be necessary, in this case, to speak of inventions or improvements in machines. Inventions pertaining to machines may, for the purpose of such explanations as the court find it necessary to give you in this case, be divided into four classes. First, where the invention embraces the entire machine, as a car for a railway, or a sewing-machine, as was decided by this court in a well-known case. Such inventions are seldom made, but when made, and duly patented, any person is an infringer who, without license, makes or uses any portion of the machine. Under such a patent the patentee holds the exclusive right to make, use, and vend to others to be used, the entire machine; and if another, without license, makes, uses, or vends any portion of it, he invades the right of the patentee.

The second class of inventions referred to are those which embrace one or more of the elements of the machine, but not the entire machine; as the coulter of the plough, or the divider of the reaping-machine. In patents of that class any person may make, use, or vend all other parts of the machine or implement, and he may employ a coulter or a divider in the machine mentioned, provided it be substantially different from that embraced in the patent.

The third class of machines which are to be mentioned are those which embrace both a new element and a new combination of elements previously used and well known. The property in the patent in such a case consists in the new element and in the new combination. No one can lawfully make, use, or vend the machine containing such new element or such new combination. They may make, vend, or use the machine without the patented improvements, if it is capable of such use; but they cannot use either of those improvements without making themselves liable as infringers.

The fourth class of machines to be mentioned are those where all the elements of the machine are old, and where the invention consists in a new combination of those elements, whereby a new and useful result is obtained.

Most of the modern machines are of this class, and many of them are of great utility and value. You will observe that in this class the invention consists solely in the new combination; and the rule is, that the property of the inventor, if duly secured by letters-patent, is in all cases exactly commensurate with his invention. Such an invention, however, is but an improvement upon an old machine; and consequently the patentee cannot treat another as an infringer who has also improved the original machine, by the use of a substantially different combination, although the machines may produce the same result. But every inventor is entitled to the full benefit of his invention, as described and secured in his patent; and no one charged with infringing the same can successfully defend himself against the charge merely because the machine he makes, uses, or vends differs from that of the plaintiff in any respect which does not render the machine so made, used, or vended substantially different from the patented machine.

Inventions of the fourth class are just as meritorious as those of any other class, and the property of the inventor is entitled to the same protection. When we speak of the property of the inventor, we refer to the exclusive right which the letters-patent secure to him, to make, use, and vend to others to be used, the improvement therein described for the term specified in the patent. Take the patent, for example, on which the suit is founded. The plaintiff's property as assignee of the patentee — if the patent is valid — consists in the exclusive right to make, use, and vend to others to be used, the patented improvement for the period specified in the patent. The patentees have that property in their inventions, as secured by letters-patent, and they have no other; hence it is that courts of justice have uniformly held that patents for inventions are not to be treated as mere monopolies, and therefore odious in the eye of the law, but they are to receive a liberal construction, and, if practicable, are to be so interpreted as to uphold and not to destroy the rights of the inventor.

Objection was made by the defendant to the introduction of the letters-patent described in the declaration, but the objection was overruled by the court, and it will be your duty to regard it as properly admitted. Such objections are made to the court, and are never for the consideration of the jury, whether they are sustained or overruled.

The plaintiffs having introduced the letters-patent described in the declaration, the *prima facie* presumption is that they are the assignees, and that the patentee is the original and first inventor of what is therein described as his improvement. The reason of that presumption is, that the letters-patent were issued by a public officer, acting under the authority conferred upon him by an act of Congress. The substance of the provision in that behalf is, as I have before explained, that any person having made an invention or discovery such as is described in § 6 of the Patent Act, may, if he desires to obtain an exclusive property therein, "make application, in writing, to the Commissioner of Patents, expressing such desire; and the Commissioner, on due proceedings had, may grant a patent therefor." The effect of the provision is, that the Commissioner of Patents is

authorized to determine, in the first place, whether the applicant is entitled to a patent, and having determined that question in the affirmative, and issued the patent, the *prima facie* presumption is, that he correctly performed his duty ; consequently, that the patentee is the original and first inventor of his described improvement. Such presumption, however, is not conclusive in any case, but may be overcome by legal evidence, showing, to the reasonable satisfaction of the jury, that the patentee was not the original and first inventor of the alleged improvement in point of fact.

Although the presumption referred to is not a conclusive one, still it is sufficient to support the issue on the part of the plaintiffs, unless it is overcome by evidence to show that the fact is otherwise ; and the burden of proof on this branch of the case is upon the defendant.

Evidence was also introduced by the plaintiffs, tending to support the allegation of infringement, as laid in the declaration. You have already been told that the burden of proof on the question as to the novelty of the invention is upon the defendant ; but the burden of proof on the issue of infringement is upon the plaintiffs. They charge infringement, which is a wrongful act, in the nature of a trespass ; and inasmuch as no one is presumed to do wrong, the rule is, that he who alleges that another has committed a wrongful act must prove it. Granting the rule to be as stated, the plaintiffs introduced testimony tending to prove the allegation of infringement, and rested their case in the opening.

You will remember that two defences were opened by the counsel for the defence : First, that the assignor of the plaintiff was not the original and first inventor of the improvement described in the letters-patent on which the suit is founded ; second, that the defendant never infringed the patent, as alleged in the declaration. Both parties agree that the two issues mentioned present the principal questions in the case, and most of the evidence introduced by the respective parties has been directed to one or the other of those issues.

In considering these questions, and weighing the evidence bearing upon them, it becomes necessary that you should know what the invention is, as described in the letters-patent on which the suit is founded. The construction of a patent is always a

question of law, exclusively for the court, except in cases where the patent contains technical words or phrases, or terms of art which require explanation by parole testimony. The present case is one where the construction of the patent is a question exclusively for the court. Viewing it in that light, counsel on the one side and the other have been heard on that subject, and the question has received our deliberate consideration.

The claim of the patent is "the combining with the process of cleansing sugar by centrifugal action, in the centrifugal machine, a means or process of forcing the cleansing liquid or syrup in one or more fine jets or streams under high pressure or velocity against the mass of sugar in revolution, the whole being substantially as above described." Due weight must be given to the words, "the whole being substantially as above described," which is a direct and emphatic reference to the description of invention as contained in the specification. Independently, therefore, of the general rule, that makes it the duty of the court, in construing the claim of a patent, to look at the entire patent, including the specification and drawings, it is especially necessary to do so in this case because of the emphatic reference made in the claim to the prior description of the invention. As recited in the patent, the invention is described to be "a new and useful improvement in purifying and cleansing sugar," and the introductory sentence of the specification describes it as "a new and useful invention, having reference to the cleansing or bleaching of sugar"; and the patentee states that it "may also be applicable to other useful purposes of like nature." Nothing of that kind, however, is otherwise described in the specification, and it is not perceived that the suggestion, unaccompanied by any other explanation, can have much weight in determining the character of the invention. Speaking of the state of the art, the patentee admits "that water or other cleansing liquid has, for the purpose of cleansing sugar, been gradually poured or discharged upon or near the centre or other suitable parts of a mass of sugar contained in a centrifugal machine, while the foraminous vessel of such machine was in rapid revolution"; but he utterly repudiates the idea of making any claim to any such procedure. On the contrary, he states that his invention consists in combin-



ing with that well-known process, as specified, "a process or means of forcing such cleansing liquid in numerous fine jets or streams, under a high degree of pressure, against the mass of sugar while under centrifugal action"; and he makes that statement in immediate connection with the important declaration that his invention enables him to use thick syrups to great advantage, and that thick syrups prevent the melting of the sugar crystals. Moreover, he also states that he has discovered "that if, when a mass of sugar is in revolution in a centrifugal machine, a minute stream of syrup or other saccharine matter is caused to impinge against it, the impinging force of the stream will cause it to so act against the inner or exposed surface of the mass as to penetrate the same without melting it, and also that the combined forces of impingement and centrifugal action greatly facilitate the cleansing of the sugar." Reference to the further statements of the patent, immediately following the description of the mechanism of his apparatus, will show, with the preceding explanations of the patentee in respect to thick syrups, that the important results obtained by his mode of operation point to the characteristic and most important features of the invention.

Mention should here be made that the patentee, in speaking of his invention, describes it as an apparatus; and in carrying it out, he states that he employs it in connection with one or more centrifugal machines, which he admits are well known. His description of the apparatus is, that at a suitable height above the centrifugal, he places a tight vessel, made of strong material, capable of bearing great internal pressure; that he provides that vessel with a filling pipe, having a stopcock in it; and he also states that it may have a safety-valve and a glass tube, arranged as shown in the drawing, and made to communicate at each end with the interior of the principal vessel, in order that the height of the liquid in the vessel may be indicated by the liquid in the tube. He also states that a pipe leading from an air force-pump may enter the upper part of the above-described vessel; and that another pipe, having a stopcock near its upper end, will lead from the bottom of the vessel, and communicate with a flexible pipe, arranged over each of the centrifugal machines. Continuing the description, he also states that each flexible pipe termi-

nates in a perforated nozzle — “foraminous,” he says — which may be provided with a stopcock; and that there may also be a stopcock at the lowest extremity of the pipe, which proceeds from the bottom of the principal vessel.

Brief as the description is, it is nevertheless amply sufficient, in connection with the model in the case, to enable you to understand the exact character of the apparatus. A precise description is then given of the mode of operating the apparatus, in order to produce the described result. The first step is to charge the reservoir with strong or thick cleansing liquor or syrup until it is about two thirds full of such liquor. That is the first step. The next step is, to force air into the reservoir, and let it be condensed therein, under a high pressure, varying, however, according to the character of the sugar to be cleansed or bleached. When these steps are taken, the apparatus described is ready for use. But the centrifugal machine or machines must be charged with a mass of sugar and be put in rapid revolution. Nothing then remains to be done but to open the proper stopcocks, especially the one at the lower end of the flexible tube directly over the centrifugal machine, and direct the perforated nozzle of the same so as to discharge with great velocity and force the minute streams of cleansing liquid against the inner surface of the mass of sugar lying against the inner surface of the rotary vessel of the centrifugal machine, taking care to move the nozzle so as to cause the streams to be laid on the sugar evenly.

Doubtless, these suggestions as to the course of reasoning adopted by the court in coming to a conclusion as to the true intent and meaning of the patent under consideration might have been omitted; but in view of the importance of the question, we have thought that it was due to the parties to present these preliminary explanations as to the nature and characteristics of the invention. They are all derived from the patent, and appear to be incontrovertible.

Repeating the remark, that the construction of the patent in this case belongs to the court, you are instructed that the invention of Gustavus A. Jasper consists in an apparatus of described means for the purpose of cleansing or bleaching sugar with liquor, as set forth in the specification of the letters-patent.

The defendant's views are, that the invention consists merely

in combining with the centrifugal machine the mechanical means the patentee has described for discharging, under high pressure or velocity, upon the sugar contained therein, the cleansing liquor or syrup mentioned in the specification ; but it is not possible to give you that instruction, for the reason already explained. Plain as those explanations are, however, the object is made even plainer by what immediately follows in the specification. The patentee expressly disclaims his invention as a pressure liquoring apparatus, and states that his object is "to combine with the force induced by the centrifugal machine a force which shall so operate on the cleansing liquor or syrup as to drive it with such velocity into the sugar, while in revolution, as to prevent such sugar from being melted at the surface of impingement." Unquestionably, he contemplates the issue of fine jets or streams, because he states, in addition to what has already appeared, that by throwing the cleansing liquor in minute streams against the surface of the sugar, its tendency to melt the crystals is greatly diminished ; and he adds, in that connection, that the smaller the streams the less is their liability to produce that effect.

Special mention was made by the patentee in the outset that his invention enabled him to use thick syrups as cleansing liquids ; and his first direction to the operator is, that the reservoir shall be two-thirds filled with a strong or thick cleansing liquid or syrup ; and at the close of his description of the advantages of his invention, he repeats for the third time that his invention enables him to employ very thick syrups as cleansing liquids, and thus to diminish the chance of melting the crystals or particles of sugar to be cleansed. Cleansing or bleaching the sugar is not the only object intended to be accomplished by the apparatus ; but the intent and purpose of accomplishing that object with smaller loss, or less melting of the crystals of sugar to be cleansed, are unmistakably indicated and disclosed in the description given of the invention, as well as in the directions to the operator, and in the summing up of the advantages claimed for the invention over previous machines. Detached passages of the specification, if separately considered, might possibly lead to a different conclusion. But the different parts of an instru-

ment must be compared with each other, and the instrument considered as a whole; and when so considered it leaves no doubt in the mind of the court that the invention of the plaintiffs consists in an apparatus of described means for the purpose of cleansing or bleaching sugar with liquor, as set forth in the specification of the patent.

A description has already been given of the elements of the apparatus, and of the means described by the patentee for carrying his invention into effect. Before any inventor can receive a patent for his invention, he is required to deliver a written description of the same, and of the manner of making and constructing it, in such full, clear, and exact terms as to enable any person skilled in the art to practise the invention. Where an invention consists of a machine, he must fully explain the principle and the several modes in which he has contemplated the application of that principle, by which it may be distinguished from other inventions. But he is not required to specify such well-known substitutes for any particular element of his invention, as any constructor acquainted with the art fully understands is usually employed as such substitute for the accomplishment of the same function.

All the elements of the invention in this case are old, and the rule in such cases, as before explained, undoubtedly is, that a patentee cannot invoke the doctrine of equivalents to suppress all other improvements of the old machine; but he is entitled to treat every one as an infringer who makes, uses, or vends his patented improvement without any other change than the employment of a substitute for one of its elements, well known as such at the date of his invention, and which any constructor acquainted with the art will know how to employ. The reason for the qualification of the rule as stated is, that such a change — that is, the mere substitution of a well-known element for another, where it appears that the substituted element was well known as a usual substitute for the element left out — is merely a formal one, and nothing better than a colorable evasion of the patent.

The means for carrying out the invention are: first, a tank containing the liquor; second, a suitable pipe or hose to con-

vey the liquor to a point near the centrifugal machine; third, a flexible hose, with a short perforated nozzle, to enable the operator safely and efficiently to perform the required manipulations; fourth, an air force-pump, entering the upper part of the tank, and forcing air into the same and condensing it therein, under a high pressure, varying as may be required for the kind of sugar to be treated. Such are the means described in the specification. But it is undoubtedly true that the patent includes such known substitutes for the described means as were within the knowledge of constructors acquainted with the art, and well known as usual substitutes for performing the same purpose.

Guided by these rules as to the construction of the patent, you will proceed to the consideration of the merits of the controversy. Coming to the merits of the controversy, your attention will first be directed to the question whether the assignor of the plaintiffs is the original and first inventor of the improvement described in the patent, as expounded by the court. Whether he is so or not is a question of fact which you must determine under the instructions of the court, from all the evidence in the case applicable to that issue. Attention should always be paid, in causes like the present, to the precise positions which the respective parties assume as serving to facilitate the investigation; and you will find it necessary or convenient to follow that suggestion with some care in this case, else there is great danger that you may be led into error. In the opening, the defendant conceded that the assignor of the plaintiffs had made an invention, and that the same was secured to him by letters-patent, specified in the declaration; but he denied that the patent embraced any such apparatus as that which the defendant employed in his sugar refinery during the period covered by the charge of infringement. The closing counsel makes the same denial; but he insists, at least, by the course of argument, not in direct terms, that if it shall be otherwise determined, still the plaintiffs are not entitled to recover, because, as he contends, the defendant's apparatus, as used in his refinery, was substantially the same as that employed in the Cabot Street establishment and that employed in the Northampton Street refinery; and that the apparatus there employed was invented and used in those estab-

lishments prior to the date of the invention on which the suit is founded. But the court declines to submit any such complicated issue for your consideration. Looking at the pleadings, it is obvious there are two principal issues to be determined; and they are, as before explained: first, whether the assignor of the plaintiffs is the original and first inventor of his alleged improvement; and, secondly, whether the defendant has infringed the patent. Confine your attention, in the first place, to the question of novelty, and do not suffer the questions to be commingled, as the inevitable effect of that course of investigation is to produce embarrassment and confusion. Persons having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement, or any art, machine, manufacture, or composition of matter not known or used by others before such discovery or invention, and not, at the time of the application for a patent, in public use or on sale with their consent or allowance, are entitled to a patent.

The proposition of the defendant also is, that the supposed invention, described in the declaration, was not new at the date of the letters-patent, but that the same was well known to various persons employed in the establishment of the Union Linen Company, at Cabot Street, and that the same apparatus, or one substantially the same, was used prior to the date of Jasper's invention for the purpose of cleansing or bleaching sugar. The evidence shows that the establishment at Cabot Street, or the principal interest in it, belonged to the firm of Sampson & Tappan. The theory of the defendant is, that the use of such apparatus was commenced at that establishment the latter part of May, 1861, and that the use was continued there throughout that year, and until the proprietors broke up the establishment and removed to Northampton Street, in January of the following year. They commenced to move from Cabot Street to Northampton Street in December, 1861; and the theory of the defendant is, that the same apparatus was used in that sugar refinery as early as the latter part of February following. The ground assumed by the defendant is, that the apparatus was invented, constructed, and put in operation at both these

places by George E. Evans, or under his superintendence and direction, and that he continued to use it at the latter place, sometimes with water, sometimes with liquor, under varying circumstances, as detailed in the testimony of the witnesses, from the day the proprietors of that refinery commenced operations at that place, to the date of the alleged invention made by the assignor of the plaintiffs, and to a much later period. Parties defendant in a suit like the present are permitted to plead the general issue, and to give certain special matters in evidence of which notice in writing may have been given to the plaintiff or his attorney thirty days before the trial. Take, for example, the case under consideration. The defendant might give notice, in writing, that he would offer evidence to prove that the assignor of the plaintiff was not the original and first inventor or discoverer of the thing patented, or the substantial and material part thereof claimed as new. But the same section of the Patent Act requires, that whenever the defendant relies in his defence upon the fact of the previous invention, knowledge, or use of the thing patented, he shall state in his notice of special matter the names and places of residence of those whom he intends to prove to have possessed the prior knowledge, and when and where the same had been used. Both parties were desirous of coming to the trial of this case at the regular session held here in May last; but the cases having precedence on the docket prevented the court from complying with their request. Unable to grant their request for an immediate trial, on account of the near approach of the regular session of the court in another district of this circuit, the court, at the request of the parties, assigned the case as the first to be tried at the special session of the court to be held on the 4th of September, which was ordered in part to accommodate the parties in this suit. They accordingly appeared, and on the morning of the day when the trial was to have been commenced, the affidavit of George E. Evans was presented to the court by the defendant.

The statement of the defendant was, that he was ready to go to trial if the plaintiffs would waive the statute requirement of thirty days' written notice of defence; but inasmuch as the plaintiffs declined to waive this requirement, and inasmuch as no such



notice had been given, the case was continued until the present term, to enable the defendant to give that notice. Such notice was afterwards given, and the witness, George E. Evans, has been fully examined in the case. His testimony has been the subject of comment by both sides, and in the course of those comments certain material parts of it have been very carefully reviewed. The argument for the defendant is, that this testimony proves that the apparatus described in the patent, as construed by the court, was invented and constructed by the witness, in the form of an operative machine, at the establishment in Cabot Street, as before explained, and also at the Northampton Street sugar refinery, for three months before the assignor of the plaintiffs had reduced his supposed invention to practice as an operative machine, or had any definite knowledge of its actual mode of operation. The views of the plaintiffs are, that these statements of the witness are all founded in error; that he never invented anything pertaining to the patented invention, and that he never constructed or used any such apparatus as he pretends, at the establishment in Cabot Street at any time, nor at the sugar refinery in Northampton Street until some time after the assignor of the plaintiffs made the patented invention, and the same has been successfully reduced to practice as an operative machine at the establishment of the Union Sugar Refinery, at Charlestown, in this district.

Witnesses are presumed to speak the truth; but experience shows that they are often in error, and that sometimes they are false; and the rule is, that whenever their truthfulness is called in question, the jury are to judge of their credibility under the instructions of the court. Regarding the matter in that light, the defendant has called your attention to several general considerations which, as he insists, have a strong tendency to support the witness, and to the testimony of the other witnesses in the case who have testified to any material facts or circumstances confirmatory of his statement. On the other hand, the plaintiffs assail the truthfulness of the witness, and insist that he is mistaken, or has sworn falsely, and that the witnesses called to confirm his statements are mistaken as to dates; and that, in point of fact, there was no attempt to

liquor sugar according to the plan of the patent, until long subsequently to the time when he had put his invention in practice at the establishment of the plaintiffs. They (the plaintiffs) contend that he is contradicted by so many witnesses, and by such incontrovertible facts and circumstances, that you ought not and cannot believe his testimony. When falsehood is imputed to a witness, the question is always for the jury ; and the rule is, that if they find he has wilfully sworn falsely as to a fact material to the issue, they are at liberty, if they deem it proper to do so, to disbelieve everything he has stated in the case. The correctness of that rule is admitted by the defendant, and he asks that it may be applied to some of the plaintiff's witnesses. In order to defend the witness, George E. Evans, against the charge of falsehood, he (the defendant) makes the same charge against the president of the plaintiffs' corporation, the patentee, and the senior member of the firm of Sampson & Tappan, who was one of the principal owners of the two establishments to which reference has been made.

Where there is a conflict of testimony, it is the duty of the jury to reconcile it, if they can reasonably do so ; but if they cannot reasonably reconcile it, and are obliged to come to the conclusion that it is false on the one side or the other, then it is their duty fearlessly to determine, if they can, where the truth lies. Doubts on this issue must weigh in favor of the plaintiffs, because the burden of proof is upon the defendant. Looking at the whole evidence, perhaps you will come to the conclusion that there is reason to believe that a valuable invention has been made by some one at some time, and it is not going too far to say, that the issue most strenuously contested in the trial has been whether it was actually made by George E. Evans or the assignor of the plaintiffs. The apparatus of William P. Breck and the foreign patents must not be overlooked. They will be brought to your notice in due season ; but the several propositions of the parties to such a controversy cannot all be considered at the same moment. The theory of the plaintiffs is, that the invention was made by their assignor ; and one theory of the defendant is, that it was made by his principal witness. Experience shows that much light is often derived in endeavoring to ascertain the

truth from a mass of testimony, by looking with careful scrutiny at the conduct of the parties whose acts are called in question or are the subject of inquiry.

The patentee applied for a patent, and the same was granted to him; and he has since been engaged, as he has testified, in perfecting the invention. The date of the patent is the 27th of January, 1863, and it does not appear that George E. Evans set up any claim as the inventor of the improvement prior to the 1st of September last, when he gave his affidavit. Weigh this circumstance, and give it such consideration as you think it deserves, bearing in mind that inventors are not obliged to apply for a patent or to make known the result of their inventions. Inventions ought not to be supported by false testimony, and letters-patent ought not to be broken down by any such means. Courts of justice are supposed to be able to investigate such an issue and ascertain the truth; and the court feel it to be their duty to urge you to apply your best powers to the accomplishment of that object. Examine the testimony of George E. Evans, and see if you have any reason, and if so, to what extent, to doubt his veracity, giving due weight to everything adduced in evidence to confirm his testimony. Carefully examine, also, the testimony of the proprietors of the establishments where he was employed, and of the president of the plaintiffs' corporation, and of the patentee, and of all the other witnesses who have testified to facts or circumstances confirmatory of their statements, and decide whether you have any, and if any, what reason to disbelieve what they have testified.

The suggestion of the defendant is, that the testimony of the witnesses for the plaintiffs on this issue is merely negative, and that the affirmative statement of a witness as to what he saw and heard is entitled to more credit than the negative statement of another witness that he did not see or hear the same thing. Unquestionably, the rule is so, where the testimony of a witness called to contradict an affirmative statement is merely negative; and it is for your consideration whether the testimony of the plaintiffs' witnesses as to what was or was not done at Cabot Street or Northampton street is really negative. The testimony of the president of the corporation is, that he was the commission merchant, the

agent who furnished the proprietors with all the raw material, — some sugar, some melado, some molasses, — all the raw material for the manufacture of the sugars made in those establishments. The first stock furnished, as he states, was for the purpose of experiment on the open pan, which he particularly describes. Having authorized the experiment, he visited the place, sometimes two or three times a week, and sometimes daily, and oftener, for the purpose of watching the experiment, and of seeing if it was likely to be successful. The statements of the proprietors of the establishment are, that they were there, one or both of them, at the same time, and they substantially concur in the statements of the president of the corporation. Other witnesses are called who had occasion to visit the establishment, and who had an opportunity to know if any apparatus was used there as the defendant assumes was used, and they all deny that they ever saw anything of the kind.

Severe criticism is made by the defendant upon the senior partner of the firm, whose members were the principal proprietors of those establishments. The witness admits that he was mistaken as to the date of the first attempt of George E. Evans to cleanse or bleach sugar with liquor in a centrifugal machine ; and he also admits, that while he was under that erroneous impression as to the date, he stated that the operations of defendant's witness were prior to the alleged invention of the assignor of the plaintiffs. Mistakes as to dates are of frequent occurrence, even with honest witnesses, and where it satisfactorily appears that it was without intentional error, the fact that such mistake was made is not entitled to much weight, as affecting the credit of the witness. Intentional misstatements on the part of a witness, if material to the issue, are as much perjuries as any other species of false swearing. Examine the testimony of the witnesses, in view of this explanation, and determine for yourselves whether the contradictory statements of the witness do really affect his credit.

Certain other testimony is introduced by the defendant to prove what he stated to the defendant, and to some one or more of the party who accompanied him in the visit to the counting-room of the witness, subsequent to the special session of this court on the 4th of September last. Those contradictions are

in evidence, and are for your consideration. Such contradictions do not tend to prove the disputed fact, and are only admitted as affecting the credit of the witness; and you should keep in mind his explanation, that he did not hear the affidavit read, and that he was still in error as to the date of the experiment made by the witness for the defendant. Subsequently, as he states, he examined certain letters, written by himself at that time, and saw the bill of the first sugar — of the 26th of August — purchased for the making of liquor, and became fully convinced that he was in error as to the date. Plainly, these explanations ought to have weight, in connection with the contradictory evidence, and it is for you to say whether or not they are satisfactory. Consider for a moment what the mistake was which he affirms he made, and perhaps it will aid you in coming to a right conclusion. According to his testimony, he made no mistake as to anything which occurred at Cabot Street, because he still affirms, in the most positive terms, that he has no knowledge of any such experiments being made there as are described in the testimony of the principal witness of the defendants. His mistake, as he states, was as to what occurred in Northampton Street, in the experiments made there with the sugars purchased and sent there for that purpose by Mr. Holden, or the president of the plaintiffs' corporation. The plaintiffs admit that such experiments were made at that refinery, and one of the questions in controversy between the parties is, when they were made. The error of the witness, as he states, was as to that date, and his testimony now is, that it was subsequent to the invention described in the declaration. The patentee states that he commenced his operations for starting a sugar refinery in Charlestown in April, 1862, and gives a detailed statement of the various experiments which he made before he arrived at the patented result. The repetition of these experiments is unnecessary, as they have been the subject of comment on both sides.

The first experiments were made with a barrel of sugar which he obtained from the East Boston house, and on the 8th of May, 1862, he procured another barrel of sugar from the same place for a similar purpose. His idea was, as he states, at that time, to run the sugar through the centrifugal machine, and after the syrup

was thrown out, to remove the mass of sugar from the machine, mix it with white liquor, and then run it through the machine for the purpose of cleansing or bleaching it ; but while the product was good, he found he must use too much liquor to allow any considerable profit. Experiments were shortly after made, he says, with a barrel filled with white liquor, but the first result was not satisfactory. Further experiments were made by the witness on the 4th of August, 1862, with the barrel and white liquor, first placing the barrel on the next floor above the basement, and afterwards on the third floor. The result was satisfactory, and he then gave orders for the pipe or hose ; workmen commenced putting up the pipe on that day, and the apparatus was completed, as the witness states, in about ten days, so that he commenced using it on the 18th of August of the same year. On the other hand, the defendant denies that the patentee ever made any such experiments with the barrel and white liquor as he has described in his testimony, and has called several witnesses employed in the establishment, who testify that they were at work there at the time, and never saw anything of the kind. The president of the corporation testifies that he was present and saw the experiments made, and witnessed the results ; that they used that apparatus for some three months without much change, except that the patentee purchased these sprinklers with many perforations, and used them in the place of the sprinkler with one perforation, as the apparatus was at first constructed. Several other changes were subsequently made in the apparatus, but it is unnecessary to describe them, as they have been the subject of comment at the bar.

As already explained, the patent having been introduced in evidence, affords a *prima facie* presumption that the patentee is the original and first inventor of what is therein described as his improvement. But that presumption, in the absence of the original application, extends no further back than the date of the patent, and consequently where the patentee, or those claiming under him, allege that the invention was actually made at a time prior to the date of the patent, the burden is upon the party making the allegation to prove the prior date. The allegation of the defendant is, that the assignor of the plaintiffs never made such

an invention as is claimed in the present suit ; but if you believe the patentee and the president of the plaintiffs' corporation, and find that he did make the invention, you will probably find no great difficulty in determining from the evidence when the invention was made. The theory of the plaintiffs is, that it was made at least as early as the 11th of August, 1862 ; and it does not appear to be controverted by the defendant, that if the patentee is to be believed, it was made about that time. Assuming it to be so, then you will perceive it was before any such apparatus was used at the Northampton Street refinery, as testified by the plaintiffs' witnesses, but after it was used both at the Cabot Street establishment and at the Northampton Street refinery, as testified by George E. Evans and the several witnesses called to confirm his evidence.

Reliance is also placed upon the testimony of William P. Breck, as showing that an apparatus was used by him like that described in the patent, several months prior to the invention in controversy. The construction of the patent has been given by the court, and in determining what the invention is you will look at the patent, as expounded by the court, and follow the instructions of the court upon that subject. Considering that the model of the Breck apparatus is before you, and has been the subject of extended comment on both sides, it does not seem to be necessary to enter into any detailed explanation of the machinery. A patented improvement, consisting of old elements, cannot be proved to be invalid by showing some one of the elements in some prior machine, and another in another prior machine, until it is shown that all the elements which constitute the improvement were in prior use, because the theory of such a patent is, that the elements are old, and the invention consists in a new combination, whereby a new and useful result is obtained.

Seven or eight foreign patents are also introduced for the defence, as tending to show that the assignor of the plaintiffs was not the original and first inventor of his improvement, but only two of them were brought to your attention in the closing argument. Proof of the previous invention, knowledge or use of the thing patented, is a good defence against a charge of infringement,



under the conditions specified in the Patent Act. The 15th section, among other things, provides, "that, whenever it shall satisfactorily appear that a patentee, at the time of making his application for a patent, believed himself to be the first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof, having been before known or used in any foreign country, it not appearing that the same, or any substantial part thereof, had before been patented or described in any printed publication." Where there is no evidence to the contrary, the presumption is, that the patentee, at the time of making his application, believed himself to be the first inventor or discoverer of the thing patented. The defence set up is that the invention in controversy had before been patented in a foreign country; and it can only be established by evidence that the invention, or some substantial part thereof, had before been patented in some foreign country, as alleged.

Under this notice of special matter, the defendant introduced the two patents to which your attention was called in the argument, each as covering the thing patented: First, the patent of John Gwynne. Referring to the specification of the patent, you will observe that it contains some thirty claims; but it will be only necessary to notice the 14th and 15th, as they are the only ones relied upon by the defendant. Of these, the first (the 14th) consists of "the combination, in one machine or apparatus, of the process of separation of crystals from their syrup or mother liquor, and the washing and drying the same," as described in the specification. The remaining claim is for "the system or mode of washing or cleansing the crystals, or other solid matters treated in centrifugal machines, as hereinbefore described." The elements of the apparatus are described in the specification, but inasmuch as the model is before you, it does not seem to be necessary to reproduce them in the summing up. The patent of De Costa, of the 12th of December, 1854, which is a foreign patent, was also introduced. Three claims of the patent were adverted to by the counsel for the defendant. They are the 4th, 5th, and 7th, as given in the translation introduced in evidence. The 4th claim is for "the various means and methods for intro-

ducing the liquor from below, either by two concentric tubes or by a single tube through holes of all sorts of shapes, spirally or obliquely placed at various points, and particularly at the upper part of the central shaft." The 5th claim is for "the new method of crystallizing, moulding, and liquoring every shape of sugar-loaves that have a hole through the middle, and that are liquored by centrifugal force, according to the method indicated" in the specification. The 7th claim is for "the use of the pump described, of whatever form, dimension, or material."

A repetition of the description of the elements of the apparatus would be of little aid to you in your investigation, as the model is in the case and has been the subject of careful comment at the bar; one of the experts, in speaking of the apparatus, says that the means which the patentee clearly contemplated, as far as he could judge, was to give a cover to the centrifugal, so as to enclose it, and keep its contents inside of it securely, and to assist in keeping the machine from trembling, by furnishing another bearing to the shaft. The machine being covered, he further infers that the operator cannot get at the inside to act upon anything within it, while it is in motion; and his opinion was, that the machine was designed to wash whatever was put into it, whether beet pulp or anything else; and that, in order to get the washing fluid into it, the inventor intended to get it up by means of a pipe through the body of the machine, and discharge the fluid through perforations in the pipe inside. Working in that way, it is his opinion that it could not produce the operation of the invention in controversy, — first, because there is no indication that pressure is to be used; second, because there is no provision by which the nozzle can be held close up to the mass to be cleansed, so that the streams can be discharged distinctly and with force upon the material to be treated; and third, because there is no provision whatever by which the liquor can be applied equally over the mass, or in any manner, under the direction of the operator. Recommending these suggestions to your careful examination, it is unnecessary to say more, except to remark that we think you ought not to come hastily to the conclusion that the patented improvement in this case is superseded by either of these foreign patents.

The jury have a right to adopt such order of inquiry as they see fit ; but it is suggested as a convenient order that you inquire and determine, in the first place, whether George E. Evans invented, constructed, and used such an apparatus as is described in his testimony, either at the establishment in Cabot Street or at the sugar refinery at Northampton Street, before the date of the invention of the assignor of the plaintiffs. Such order of investigation would be convenient, because, if you find that he did not, then you need not proceed any further in that inquiry, so far as what he did is concerned. But if you find he did construct and use the apparatus described in his testimony, before the date of the patented invention, you will then proceed to inquire whether he reduced it to practice as an operative machine.

Courts of justice have established the rule, that crude and imperfect experiments, equivocal in their results, and then abandoned and given up, shall not be permitted to prevail against an original inventor who has perfected his improvement and obtained his patent. The settled rule is, that it is not enough to defeat a patent to show that another conceived the possibility of effecting what the patentee has accomplished, unless it also appears that he reduced what he conceived to practice in the form of an operative machine. To constitute a prior invention, he who is alleged to have produced it must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form. Consequently, you are instructed, that if what you find to have been done by any one before the date of the patented invention, as established by the evidence, did not amount to a successful reduction to practice of the mode of operation described and claimed in the patent for cleansing or bleaching sugar, then such acts of experiment do not have the effect to invalidate the patent. Governed by these instructions, if you find that what was done by George E. Evans prior to the date of the patented invention in the manufacture of sugar, did not amount to a successful reduction to practice of the mode of operation described and claimed in the patent for the cleansing or bleaching of sugar, then you need not proceed any further in the examination of the evidence in this branch of the case, as it is clear his experiments afford no defence.

Believing that in any view you may take of the evidence, you will find it necessary to compare the Jasper apparatus, as described in the patent and expounded by the court, with the apparatus which George E. Evans testified he constructed at Cabot Street and at Northampton Street, and perhaps with the apparatus of William P. Breck, and those described in the two foreign patents to which your attention has been called, we will next proceed to give you the necessary instructions applicable to such inquiry.

Proceeding to such inquiry, you are instructed that whether the apparatus described by George E. Evans in his testimony, or that described by William P. Breck, if you find that he employed it, or either of those described in the foreign patents, is substantially the same as the patented invention, as expounded by the court, is a question of fact for you to determine, under the instructions of the court. In determining that question, you are not to determine about similarities or differences merely by the names of things; you are to look at the machines and their several devices and elements in the light of what they do, or what office or function they perform, and how they perform it; and to find that a thing is substantially the same as another if it performs substantially the same function or office in substantially the same way, to attain substantially the same result; and that the things are substantially different when they perform different duties in substantially a different way, or produce a substantially different result.

For the same reasons you are not to judge about similarities or differences merely because things are apparently the same or apparently different, in shape or form; but the true test of similarity or difference in making the comparison is the same in regard to shape or form as in regard to name, and in both cases you must look at the mode of operation, — the way that the parts work, and at the result, as well as at the means by which the result is attained. In all your inquiries about the mode of operation of other machines, you are to inquire about and consider more particularly those portions of the particular part or element which really do the work, so as not to attach too much importance to the other portions of the same part which are only

used as a convenient method of constructing the entire part or device. You will regard a well-known substantial equivalent of a thing as being the same as the thing itself; so that, if two machines, having the same mode of operation, do the same work, in substantially the same way, and accomplish the same result, they are the same. And so, also, if the parts of two machines, having the same mode of operation, do the same work, in substantially the same way, and accomplish substantially the same result, those parts are the same, although they may differ in name, form, or shape. But in both cases, if the two things perform a different work, or in a way substantially different, or do not accomplish the same result, then they are substantially different.

Applying to the case the several instructions given by the court, you will inquire and determine whether the assignor of the plaintiffs is or is not the original and first inventor of the invention described in the patent, as expounded by the court. Should you find from the evidence that he is not the original and first inventor of the improvement, then you need not proceed any further, but your verdict should be for the defendant. But if you find that he was the original or first inventor of the improvement, as alleged in the declaration, then you will proceed to consider the issue of infringement.

The charge of infringement is made by the plaintiffs, and the burden of proof is upon them to prove the allegation to your reasonable satisfaction. But in considering that question, you will assume, if you have previously so found, that the assignor of the plaintiffs is the original and first inventor of the improvement described in the patent, as expounded by the court. Counsel sometimes strive, in the trial of a cause, to blend the questions of infringement and novelty together, as jointly and interchangeably involved in every phase of a lawsuit for the infringement of a patent. Undoubtedly, they involve the same considerations, but each also involves several considerations not involved in the other. The burden of proof in one case is upon the plaintiffs; the burden of proof in the other is upon the defendant; and the evidence required to support one and the other is very different. Whether the apparatus used by the defendant during the period covered by the declaration, infringes the invention made by the

assignor of the plaintiffs, as the same is expounded by the court, is a question of fact for your determination, from all the evidence in the case, under the instructions of the court. The material facts on this branch of the case lie in a narrow compass. The declaration alleges that the infringement commenced, as before stated, on the 2d of November, 1863, and continued from that day to the 16th of January following, which is the date of the writ. The defendant concedes that he constructed and used, or caused to be constructed and used, in his sugar refinery, an apparatus such as is represented in the model introduced into the case; and, substantially, the testimony of Alexander A. Sanborn, called by the plaintiffs, is that the defendant desired him to put up a liquoring apparatus for him, to be used for liquoring with white sugar, the same as he had previously put up for the inventor while in his employment. The witness stated that it was fitted up accordingly; that he did a part of the work, and that the rest was done by other workmen, under his direction; that they placed the tank for the liquor on the fourth floor above the machine, giving thirty-two or thirty-five feet height of column as means for causing pressure at the nozzle. Instructions have already been given you on another branch of the case, presenting certain general rules of law by which you are to be governed in comparing one machine or device with another, to enable you to determine whether, in legal contemplation, the two machines are substantially the same or different; and those instructions are equally applicable to the present question with reference to the pressure apparatus of the defendant; but, considering the nature of the inquiry, we think it necessary to give you more specific instructions by which you will be governed in applying those general rules of law to the question under consideration. In examining that question, you will find it necessary to keep constantly in view the instructions of the court as to the construction of the patent on which the suit is founded, else you will be liable at every step to fall into error. By the true construction of the patent, the invention consists of an apparatus of described means for the purpose of cleansing or bleaching sugar with liquor, as set forth in the specification. What those means are, the instructions already given will enable

you to understand with clearness and certainty ; and if the defendant in his machine used, during the period covered by the charge of infringement, substantially the same means, operating substantially in the same way, and accomplishing substantially the same result, then you are instructed that the defendant's machine infringes the patent on which the suit is founded ; and if you also find that the assignor of the plaintiffs was the original and first inventor of the improvement, then your verdict will be for the plaintiffs. But if you find that the defendant in his machine used during that period substantially different means, or that the means so employed did substantially different work, and in a mode of operation substantially different, then you are instructed that the defendant's machine or apparatus does not infringe the patent described in the declaration, and your verdict will be for the defendant.

The patent declared on is not for the result, but for the means, as substantially described in the specification, for accomplishing that result. The defendant is right also, in the proposition that the claim of the patent is not for every means of cleansing or bleaching sugar with liquor, but only for the means the patentee has substantially described in his specification for accomplishing that result. Lest any mistake, however, should arise, we repeat that the patentee cannot invoke the doctrine of equivalents to suppress all other improvements of the old apparatus or machine, but he is entitled to treat every one as an infringer who makes, uses, or vends his patented machine, without any other change than a common substitution for one of its elements, well known as such, and which any constructor, without any more experiment, or resorting to invention, knew how to employ. Pursuant to that qualification of the general rule, as explained, you are instructed, that if you find from the evidence that the means of causing pressure at the nozzle used by the defendant were, at the date of the invention and of the patent, commonly known to be a substitute for the means of causing pressure at the nozzle which are particularly described in the specification, and that, consequently, those skilled in the art to which the invention appertains, or with which it is most nearly connected, could, by the use only of the knowledge which they had as constructors, substitute the mode of



producing such pressure practised by the defendant for the mode particularly described in the specification, and that, when thus substituted, it was capable of performing, and would perform, substantially the same mode of operation as the mode of operation described in the patent, then the defendant cannot successfully defend himself against a charge of infringement, merely by employing this substituted mode of producing pressure. Whether the means of causing pressure at the nozzle used by the defendant were, at the date of the invention and of the patent, commonly known to be a substitute for the means of causing pressure at the nozzle which are particularly described in the specification, is a question of fact for you to determine, from all the evidence in the case. Should you find that the defendant's means of causing pressure at the nozzle were, at the time supposed, commonly known to be a substitute for the means of causing pressure at the nozzle which are particularly described in the specification under consideration, you will then inquire whether those skilled in the art to which the invention appertains, or with which it is most nearly connected, could, by the use only of the knowledge which they had as constructors, make the proposed substitution; and if you also answer that inquiry in the affirmative, you will then proceed to the remaining inquiry of fact involved in the instructions to which the two preceding relate. The remaining inquiry involved in that instruction is, whether the substantial means or mode of producing pressure, when thus substituted as proposed, is capable of performing, and will perform, the same function in the same mode of operation, as the mode of producing pressure particularly described in the specification of the patent; and if you answer this inquiry in the affirmative, as well at the two others preceding it, then you are warranted in finding that the difference in the means of causing pressure at the nozzle in the two machines, as compared with each other, is a mere formal one, and that the difference in that respect is not such as of itself, without more, will enable the defendant successfully to defend himself against the charge of infringement.

Carrying out the views of the court expressed in construing the patent, you are instructed that the patent is not limited to any arbitrary mathematical amount of pressure, but that it calls

for and contemplates such a degree of pressure as is capable and sufficient to effect substantially the described object of the patentee, to drive the cleansing liquor or syrup with such velocity into the sugar, while in revolution, as to prevent such sugar from being melted at the surface of impingement ; and if the apparatus, as constructed and used by the defendant, was capable of exerting and would exert this degree of force in substantially the same way, his apparatus, in this particular, was within the patent.

Adopting these instructions as the law of the case upon the subjects to which they relate, you will examine the whole evidence upon the question of infringement, and determine whether the apparatus of the defendant, as used by him during the period covered by the declaration, infringes the patented invention, as the patent has been expounded by the court. If you find that the apparatus of the defendant, as used as aforesaid, does not infringe the patented invention, as expounded by the court, your verdict should be for the defendant ; if you find it does infringe the patent as alleged in the declaration, then your verdict should be for the plaintiffs, and you will proceed to the question of damages.

Suffice it to say, upon the subject of damages, that if you find for the plaintiffs, they do not claim more than nominal damages, as the main purpose of the suit is to establish the validity of the patent. Your verdict, if for the defendant, will be that he is not guilty ; if for the plaintiffs, that the defendant is guilty, and you may assess damages in the sum of one dollar, which is the more usual sum in this court where the verdict is for nominal damages. Under the circumstances of the case, we do not think it necessary to remark further upon the subject, except to say that in general the claim for damages in cases of this description is no test of the importance of the controversy. Parties coming into this court, as in all other similar tribunals, have a right to expect that justice will be administered according to the law and the evidence, and it is the duty both of the court and the jury to fulfil their just expectations in that behalf.

The jury then retired for deliberation, and remained out until the next morning.

TUESDAY, *November 14.*

The court came in at ten o'clock, and, by direction of the presiding justice, the jury were summoned to the room. When they had taken their seats, Judge Clifford said: —

GENTLEMEN OF THE JURY, — One member of the court received a note from your foreman this morning, which was very properly framed, but yet the question put was one which, in the view of the presiding justice, could not be answered either way without danger of misleading you. In other words, it required an explanation which the presiding justice thought, inasmuch as the court had adjourned, and his associate justice was not present, he did not possess the authority to make. Hence he found it necessary to request you to remain in session. It would have afforded me the greatest pleasure to have relieved you, if I had thought I could properly do so. I may express the opinion here, and I have no doubt that every one of you will concur in that view, that it is better that the members of the court, and even the jury, should suffer considerable inconvenience, than that the slightest irregularity should be introduced into the proceedings of this court. They have gone along since the commencement of the government until the present time without irregularities, and it is very desirable that that course should continue. In view of these circumstances I felt constrained to return the answer that the presiding justice could not answer the question directly, without explanation, and that he did not feel at liberty to give this explanation in the absence of his associate, inasmuch as the court had adjourned.

Two passages from the charge already delivered to you, carefully noted and understood, will afford you the necessary explanation upon the matter of inquiry, and it will afford you as specific an answer as it seems to be competent for the court to give, because the matter of inquiry is a mixed question of law and fact. Hence the reason why a direct answer could not safely be given, lest it should mislead.

“Lest any mistake should arise, we repeat that the patentee cannot invoke the doctrine of equivalents to suppress other improvements of the old apparatus or machine, but he is to treat every one as an infringer who makes, uses, or vends his patented

improvement without any other change than a common substitution for one of its elements, well known as such, and which any constructor without any experiment or resort to invention will know how to employ. Pursuant to that qualification of the general rule (that is, that he cannot invoke the doctrine of equivalents), as explained, you are instructed, that if you find from the evidence that the means of causing pressure at the nozzle used by the defendant were, at the date of the invention and of the patent, commonly known to be a substitute for the means of causing pressure at the nozzle which are particularly described in the specification; and that, consequently, those skilled in the art to which the invention appertains, or with which it is most nearly connected, could, by the use only of the knowledge which they had as constructors, substitute the mode of producing such pressure practised by the defendant, for the mode particularly described in the specification, and that, when thus substituted, it was capable of performing and would perform substantially the same function, in substantially the same mode of operation, as the mode of operation described in the patent, then the defendant cannot successfully defend himself against the charge of infringement merely by employing this substituted mode of producing pressure."

There the principle is laid down. Now you are referred to the evidence. So far as it is a question of law, the court has decided that; you will receive that as law.

"Whether the means of causing pressure at the nozzle used by the defendant were, at the date of the invention and of the patent, commonly known to be a substitute for the means of causing pressure at the nozzle, which are particularly described in the specification, is a question of fact for you to determine from all the evidence in the case. Should you find that the defendant's means of causing pressure at the nozzle were, at the time supposed, — that is, at the date of the invention and the patent, — commonly known to be a substitute for the means of causing pressure at the nozzle, which are particularly described in the specification under consideration, you will then also inquire, as a matter of fact, whether those skilled in the art to which the invention appertains, or with which it is most nearly connected, could, by the use only of the knowledge which they had as con-

structors, make the proposed substitution. And if you also answer that inquiry in the affirmative, you will then proceed to the remaining inquiry of fact involved in the instruction to which the two preceding relate. The remaining inquiry of fact involved in that construction is, whether the substituted means or mode of producing pressure, when thus substituted, as proposed, are capable of performing, and will perform, the same function, under the same mode of operation, as the mode of producing pressure particularly described in the specification of the patent. And if you answer this inquiry in the affirmative, as well as the two others preceding it, then you are warranted in finding that the difference in the means of causing pressure at the nozzle in the two machines, as compared with each other, is a mere formal one, and that the difference in that respect is not such as by itself, without more, will enable the defendant successfully to defend himself against the charge of infringement."

Unable to conceive that any command of language which we possess could make the matter clearer than it is there stated, we do not think it our duty to attempt to add anything to it; and you will please retire with this explanation, and with the kindest spirit towards each other, and an anxious desire to end this controversy, compare your opinions afresh, and see if you cannot agree upon a verdict.

The jury then retired, and remained out about half an hour, when they again entered the court-room, and the usual question was put by the clerk: "Gentlemen of the jury, have you agreed upon a verdict?"

*Foreman.* We have not.

*The Court.* Mr. Foreman, is there any prospect of an agreement?

*Foreman.* There is no hope of a verdict from this jury.

*The Court.* Is the difference between you law or fact?

*Foreman.* I conceive it to be law. There is a difference of opinion upon that point, even.

*The Court.* Is the subject of difference the one embraced in the instructions re-read to you this morning?

*Foreman.* I think so.

*The Court.* We do not see that we can make that matter more

explicit than we have already done. You have already been instructed that questions of law belong to the court, questions of fact to the jury; but the subject-matter of that instruction, and the questions involved in that instruction, being mixed questions of law and fact, the court without the jury cannot determine them, and the jury without the court cannot determine them. It requires both court and jury to determine them. If, in that view of the subject, Mr. Foreman, you are of opinion that there is no hope of agreement, you will rise and say so.

*Foreman.* Perhaps, if we could be enlightened upon a single point, we might agree.

*The Court.* You may state the point as clearly as you can.

*Foreman.* Whether we are to try the Matthiesson apparatus, as we have had it before us, at thirty-five feet, or whether we are to vary from that, in any conceivable manner?

*The Court.* The question propounded by the foreman is one purely of fact, so that it would not be possible for the court to render you any assistance. The evidence in the case is before you, and if you are of the opinion, Mr. Foreman, that further deliberation would result in no practical utility, and that there is no hope of agreement without the court give further instructions, you may answer.

*Foreman.* I think not; that was not the precise point we differed upon, but I suppose, by working from that, if we could get instructions upon that, we might arrive at a verdict; but I don't think it would be possible without it.

*The Court.* Consult with your fellows, and see whether they think it is worth while to retire again. You have now been out sixteen hours and a half, and I have no idea of resorting to the old barbarous mode of starving a jury to an agreement.

*Foreman* (after consultation with his associates). There is no use, sir.

*The Court.* The court regrets that you are unable to come to an agreement; but at the same time we feel that we ought to return thanks to you for the patient effort you have made, during a long period, without complaint, to reach a satisfactory result. You have had a weary service of three weeks, and, under the circumstances, the court will excuse you from any further attendance until the first Tuesday in February next.

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## ABANDONMENT.

1. Unavoidable delay, while an application for a patent is pending, is no ground for imputing abandonment. *Jones v. Sewall*, 563.
2. Mere forbearance to apply for a patent while the inventor is experimenting upon his invention, and perfecting it, testing its value, or dealing with any of its necessary incidents, practical knowledge of which is requisite to its usefulness, afford no ground for presuming abandonment. *Ibid.*

## ACCESSARY.

1. The defendants before the court, after the principal defendant's plea, were held to be principals and not accessaries. *United States v. Hartwell et als.*, 221.
2. Misdemeanors do not admit of accessaries either before or after the fact, and the general rule is, that whatsoever will make a party an accessory before the fact, in felony will make him a principal in misdemeanor if properly charged as such. *Ibid.*
3. The offence charged in this case was a misdemeanor, but it would make no difference if it were held to be a felony, as the defendants before the court were confederates of the principal defendant in the commission of the crime. *Ibid.*
4. He loaned them the public moneys, and they borrowed them knowing him to be an officer of the United States charged with the custody of the moneys. *Ibid.*
5. When the accessory is tried with the principal, the confessions of the principal are admissible to prove his own guilt, and where the principal confesses by pleading guilty and retiring from the bar under his recognizance, the record of the conviction of the principal was properly introduced, and was *prima facie* evidence of his guilt at the trial of the other defendants, and his confessions to show that he was rightfully convicted. *Ibid.*

See CONFESSIONS, 2-7.

## ACTION.

See FACTS, AGREED STATEMENT OF.

## ASSIGNEE IN BANKRUPTCY.

See BANKRUPTCY, 16, 17.

## ASSIGNEE IN INSOLVENCY.

See EQUITY, 1-10.



## BANK.

See BY-LAW.

## BANKRUPTCY.

1. Section 38 of the Bankrupt Act provides that the filing of a petition for adjudication in bankruptcy, either by the debtor or by a creditor, upon which an order may be issued by the court or by the register, shall be deemed the commencement of proceedings in bankruptcy. *United States v. Crane*, 211.
2. Railroad companies are private commercial corporations within the meaning of § 37 of the Bankrupt Act, and the District Courts of the United States have therefore jurisdiction to adjudge such corporations bankrupt, the same as in the case of other debtors. *Sweatt v. Railroad*, 339.
3. Characteristics of a public nature attach to every corporation, inasmuch as they are created for the public benefit; but if it is not created for the administration of political or municipal power, the corporation is private, unless the whole interest belongs to the government. *Ibid.*
4. Transportation of freight and passengers from one State to another, or through more than one State, either by land or water, is commerce within the meaning of the provision of the Constitution which gives to Congress power to regulate commerce between the several States. *Ibid.*
5. Congress has power to enact that railroads created by the States shall be liable to the provisions of the Bankrupt Act. *Ibid.*
6. Such corporations are not among those means and instruments of the State governments over which Congress has no power or jurisdiction. *Ibid.*
7. Inasmuch as the exclusive power to establish a uniform system of bankruptcy is vested in the Federal legislature, it has the power to authorize the District Courts or their registers in bankruptcy, to transfer the franchise of a railroad company in bankruptcy, it being a private corporation. *Ibid.*
8. Under § 2 of the Bankrupt Act, which provides that "the Circuit Court within and for the district where the proceedings shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act," a petition for a revision of the decree of the District Court refusing a discharge may be entertained, although such decree was a final one, and no proceedings were actually pending in the District Court when the petition for revision was made. *Littlefield v. Delaware & Hudson Canal Co.*, 371.
9. The word "pending" does not mean that the Circuit Court can take jurisdiction of a petition for revision only while proceedings are actually pending, and before a final decree, in the District Court. *Ibid.*
10. Discharge by a final decree was refused an alleged bankrupt in the District Court, May 12, and his petition for revision was filed in the Circuit Court, June 30 following. *Held*, there was no ground, in the absence of a rule limiting the time in which such petitions should be filed, to deprive the petitioner of a rehearing on account of delay. *Ibid.*
11. An allegation, in a petition to the Circuit Court under § 2 of the Bankrupt Act for revision, that he has conformed to the provisions of the act and is aggrieved because the prayer of his petition for discharge was refused, is not sufficient. *Ibid.*
12. The petition for revision must state in what the error consists, whether it be of

law or fact; and the nature of the alleged error should be distinctly stated for the appellate court and as notice to the opposite party. *Ibid.*

13. The United States Bankrupt Act now in force, confers jurisdiction in Equity upon the District Courts in certain cases, and appeals may be taken from the District to the Circuit Courts in all such cases where the debt or damage claimed amounts to more than five hundred dollars, provided the appellant complies with the conditions specified in § 8 of the act. *Scummon v. Cole*, 472.
14. A mortgage given to secure the payment of two promissory notes, the consideration of which being pre-existing debts of the bankrupt, for almost all of which the mortgagees were liable either as sureties or indorsers, is void when it appears that it was made within four months next preceding the filing of the petition in bankruptcy, for the express purpose of giving a preference; that the mortgagors were insolvent and the mortgagees had reasonable cause to believe that the mortgagors were insolvent at the time of the execution of the mortgage, and that the conveyance was made in fraud of the provisions of said act. *Ibid.*
15. A creditor, holding commercial paper signed by a firm in bankruptcy, and indorsed by an individual member of the firm, a bankrupt, though not a sole trader, may prove his debt against both estates and share in the dividends of each. *Emery v. Canal National Bank*, 507.
16. In this case the property covered by the complainant's claim against the trustee (which claim the complainant purchased from the assignees in bankruptcy), was property not taken possession of by the assignee, to which the title of the bankrupt is good against all the world, except the assignee or any one to whom he might convey. *Amory v. Lawrence et als.*, 523.
17. An assignee in bankruptcy is not bound to take property which may be onerous to the estate, or burden instead of benefit it. If he does not take it, it remains in the bankrupt. *Ibid.*
18. After the lapse of years, in this case, the court held that the conclusion must be that the assignee elected not to take possession of certain property of which the complainant when a bankrupt, took an assignment as set forth in the bill. *Ibid.*
19. Under the act of March 2, 1867, an assignee in bankruptcy of a person declared a bankrupt in one district, may maintain an action to recover moneys paid the defendants residents of another district, in violation of the Bankrupt Act, in the District Court of such district, and such District Court in the district where such defendants reside, has jurisdiction of the subject-matter and the parties. *Sherman v. Bingham et al.*, 552.
20. The whole tenor of the present Bankrupt Act shows that Congress intended to provide for the complete administration of the bankrupt system in the Federal Courts and through the instrumentality of Federal officers. *Ibid.*

See INDICTMENT, 1-6; WILL, 5-10.

#### BILL OF EXCEPTIONS.

1. The only office of a bill of exceptions is to bring before the appellate court such questions as were duly raised and properly saved in the subordinate court. *United States v. Barrels of Spirits*, 261.
2. The Judge of the District Court has power, when it appears by complaint or affidavit to his satisfaction that a fraud on the revenue has been committed by any person intrusted with or concerned in the importation or entry of goods, to issue his

warrant to the marshal requiring him to enter a place or premises where any invoices, books, or papers relating to the merchandise are deposited, in respect to which the fraud is alleged to have been committed, to take possession of such books and produce them before the judge. *Stockwell v. The United States*, 284.

3. It is not necessary that a complaint or affidavit should accompany the warrant. If the court is satisfied that the fraud upon the revenue has been committed, the warrant will be granted. The granting or refusing the warrant is a judicial act, and the complaint or affidavit is not necessary to be introduced where it appears, by the recitals of the warrant, that it was shown by complaint and affidavit to the satisfaction of the court that the alleged frauds on the revenue had been committed. *Ibid.*
4. Exceptions to the ruling of a court in admitting evidence should be sufficiently specific to enable it to understand the precise ground upon which the objection is based. *Ibid.*
5. All that appeared in this case was, that when the books, etc. were offered in evidence, the defendants objected that the court was not authorized to issue, or the marshal to serve, the warrant in question, and that the district attorney could not put them in evidence, because obtained by that warrant. *Held*, that the objections were not sufficiently explicit to avail the defendants at this hearing. *Ibid.*
6. The district judge could put the papers seized under the warrant in this case into the hands of the district attorney. *Ibid.*
7. It was objected that the books, etc. were not in themselves legal evidence. *Held*, that as the same were not set forth in the bill of exceptions, nor in any way made part of it, the presumption was that the ruling of the district judge was correct, and the point was not open for examination. *Ibid.*

#### BILL OF LADING.

- See COMMON CARRIER, 3; DELIVERY, 1, 2; STOPPAGE IN TRANSITU, 2-5.

#### BY-LAW.

1. The directors of a national bank, organized under the act of June 3, 1864, adopted the following by-law: "No person indebted to the bank shall be allowed to sell or transfer his or her stock without the consent of a majority of the directors, and this whether liable as principal or surety, and whether the debt or liability is due or not." A stockholder indebted to the bank assigned by deed in trust for the benefit of his creditors his stock without the consent of the directors, and the assignees requested the bank to record the deed of assignment upon the transfer-book of the bank, or that they might "be allowed to transfer the stock to themselves on the books of the bank." The requests were refused by the bank. *Held*, that the by-law was valid, and that the directors, under § 8 of the act referred to, had power to adopt the same. *Knight et al. v. Old National Bank*, 429.

#### CARE, EXERCISE OF ORDINARY.

See HIGHWAYS, 2.

#### CHARTER-PARTY.

1. Where in a charter-party no stipulation is made as to the day the vessel should sail, or the time she was to be allowed for the trip, the rule of construction is, that she is to sail within a reasonable time, and to proceed with reasonable despatch,

and without unnecessary deviation, to the place of loading, unless delayed by the public enemy or perils of the seas. *Fearing v. Cheesman*, 91.

2. Such an implied covenant in a charter-party is not a condition precedent, which, if broken, will justify the charterer in disregarding his covenants, unless the delay is so great that it deprives the charterer of the whole benefit of the contract or frustrates his object in chartering the vessel. *Ibid.*
3. A stipulation in a charter-party that the charter should commence when the vessel was ready to load, does not mean that the charter-party does not attach until the vessel arrived at the place of loading. Performance of the implied contract, that the vessel was to sail to the place of loading within a reasonable time, was as requisite as that notice of the readiness of the vessel to receive cargo should be given on arrival at the place of loading. *Ibid.*
4. A charter-party was executed April 27, 1865, while a vessel was lying in the harbor of Boston, by which she was to load at Farmingdale, Maine. No stipulation was made concerning the time at which she was to sail for the place of loading. She arrived at Farmingdale, May 20. When the master gave the required notice of the readiness of the vessel to receive cargo, the charterer refused to load her. Thereupon the following correspondence took place. From the charterer: "Will load the vessel at going rates; no other terms, damages or not." To which the owners replied that the charterer must "either load her per charter-party or pay damages." To this the following reply was received: "Will load vessel for the voyage at eight dollars, measurement or weight, difference between old and new, charter open, to be settled by the courts or by arbitration, without prejudicing the rights of either party." The final reply was: "We accept your proposition; load vessel as per despatch of this date." Thereupon the defendants loaded the vessel, and the cargo was duly transported and delivered. *Held*, that no new charter-party was made by the above correspondence, and that the respondent was liable unless he could show that the master, in failing to report the vessel within a reasonable time, had violated some condition precedent, or that the delay was so great as to frustrate the voyage. *Ibid.*
5. A vessel was chartered April 27, 1865, at Boston, to go to Farmingdale, Maine, for a cargo of ice, to be transported to Mobile, Alabama. From stress of weather, she did not arrive at Farmingdale until May 20, when she reported as ready to receive cargo. The charterers had then hired and loaded another vessel, with the cargo destined for the first chartered vessel, on the arrival of which, however, they changed the destination of the vessel last hired and sent her in fulfilment of another contract, and the vessel first named actually performed the contract for which she was chartered, and the cargo was received without complaint. *Held*, that the facts showed that the voyage was not frustrated by the delay to notify, that the vessel was ready to receive cargo, and that the owners were entitled to recover under the charter. *Ibid.*
6. Where the owner retains the possession and navigation of the vessel, and contracts to carry the cargo on freight for the voyage, the charter-party is a mere affreightment sounding in covenant, and the freighter is not invested with the legal responsibility of ownership. *Richardson v. Winsor*, 395.
7. The charter-party in such case is a contract for the conveyance of merchandise for a stipulated price. *Ibid.*
3. Where the owner parts with the possession, command, and management of the vessel, the charterer becomes the owner for the voyage. *Ibid.*

9. Courts of justice are not inclined to construe the contract as a demise of the ship, even though it may contain words of grant. *Ibid.*
10. If the owners agree to keep the vessel tight, stanch, fitted, and provisioned, and to receive on board such lawful goods as the charterers or their agents might think proper to ship, they retain the command of the vessel, and the charter-party in such case is a mere contract of affreightment. *Ibid.*
11. Then in general the owners are responsible to the charterers for failure to convey the goods according to the terms of the contract. *Ibid.*
12. Where the contract of affreightment amounts to a demise of the ship, the officers and crew are servants of the charterer, the charterer becomes the carrier of the goods shipped, and in procuring freight, the master is then the agent of the charterer. *Ibid.*
13. In this case the owners were the carriers of the goods, and were responsible to the shippers for every loss or damage to the goods during the voyage, unless it happened by the fault of the shipper, the act of God, the public enemy, or without the fault of the carrier, or was excepted in the bill of lading. *Ibid.*
14. In the absence of any special agreement, the duty of the master extends to all that relates to the lading and transportation of the merchandise, and in the case of a mere contract of affreightment, the ship-owners and master are responsible for the faithful performance of these duties. *Ibid.*
15. A stipulation in a charter-party that the ship is to employ charterer's stevedore and clerk does not amount to a special agreement, to the effect that the duty of lading and stowing the goods was to be performed by the charterers. *Ibid.*
16. This clause gave the right to the charterers to name the stevedore and clerk; but they were to be paid, and were subject to the orders of the master. *Ibid.*
17. In this case the clerk and stevedore were nominated by the charterers; but the supervision of the lading was had by an agent of the owners; the receipting for cargo, measurement, and stowage were all under his direction. Pilotage and port charges were paid by the owners, and when loaded the charterers notified the owners they wished the vessel cleared. She was discharged at the port of destination by a stevedore employed by the master. All these facts show that the owners were responsible for the safe custody, due transport, and right delivery. *Ibid.*
18. Whether the general owner retains the possession and command of the ship, or the control and navigation of the same passes to the charterer, the shipper, under an ordinary bill of lading, may have his remedy against the ship; but whether the general owner or the charterer is liable, depends upon the terms of the charter-party. *Ibid.*
19. The fact that the charterers have the privilege of appointing the head stevedore does not, as a matter of course, show them to be responsible for the character of the stowage. *Ibid.*

See DEMURRAGE, 1.

### COLLISION.

1. A schooner in the evening, close-hauled, on the port tack, was heading north by west, with the wind west-northwest. A brig on the starboard tack, with the wind at least two points free, was heading south by west half west. Both vessels were in a seaworthy condition in all respects, and had sufficient lights, and both vessels had lookouts. The speed of the schooner was five or six knots, and that of the brig

four or four and one half. When the vessels were at least one hundred and fifty yards apart, the brig ported her helm. Inevitable accident was not set up, and it was *held* not to be a case coming within the eleventh sailing rule. *Lane v. Schooner Denike*, 117.

2. The pilot on the schooner was notified by the lookout that there was a light ahead, upon which he went forward and looked at it for several minutes, and then went aft. It was not pretended that the approaching vessel would have passed to leeward by more than her length. *Held*, that he was negligent in not continuing to watch the approaching vessel. *Ibid*.
3. It is not an excuse for the pilot of the schooner that he had a right to keep his course, under the rules of navigation. *Ibid*.
4. Nothing in the rules of navigation can exonerate from the consequences of neglect of precautions such as are required by the ordinary practice of seamen, or the special circumstances of the case. *Ibid*.
5. A party who negligently casts himself upon an obstruction is not entitled to damages, and the party who inflicts an injury cannot be allowed to defend himself upon the ground that the injured party committed the first error, if the person so committing the act causing the damage had reasonable notice of the error of the other, and means and adequate opportunity to have avoided the disaster. *Ibid*.
6. The lookout on the schooner in this case had informed the pilot of the light ahead, saw the brig both before and when her helm was ported, and she attempted to cross the schooner's course. Instead of going aft, the pilot should have observed the necessity for precaution, and also watched the approaching vessel longer, in order to have obtained the same knowledge as the lookout. He could then have ported the schooner's helm in season to have avoided the collision. *Ibid*.
7. Vigilance is required from those having the conduct of both vessels, when the circumstances of their approach require caution. *Ibid*.
8. In this case it was *held* that there was negligence on both sides, and that the damages should be divided. *Ibid*.
9. A vessel in the evening was lying-to on the starboard tack, with her helm hard aport, with a competent lookout properly stationed, and with signal-lights fully displayed as required by law. Another vessel was discovered directly ahead. The order was given not to change the helm, and a collision took place. *Held*, that no negligence could be charged to those on board the vessel first named for not keeping her to her course. *Killam v. Schooner Eri*, 456.
10. Inevitable accident in cases of collision is where a disaster takes place, occasioned exclusively by natural causes, without any fault on the part of the owners or those intrusted with the management of either vessel. *Ibid*.
11. Two vessels were lying-to just prior to a collision, which took place in the night, — one with competent lookout properly stationed, the required signal-lights, on the starboard tack, with helm hard aport; the other had her red light burning brightly. Just before the collision the green light was burning, but not so brightly as it should have done. In the attempt by an officer to turn it up it went out. It was handed to a seaman, and was only seen on the starboard side by the master when the two vessels were close together. No person was specifically appointed or stationed as a lookout. All the crew were abaft of the mainmast just before the collision. A collision ensued. *Held*, not an inevitable accident, but that the vessel last referred to was in fault. *Ibid*.
12. The rules of navigation require seasonable precautions to avoid danger in collision cases. *Ibid*.

13. The ground upon which the vessel in fault in this case was clearly liable was the absence of an appointed and properly stationed lookout. *Ibid.*
14. The general rule is, that where a vessel is at anchor in a proper place, with no sails set, and another under sail collides with her and occasions injury to her, the vessel in motion is liable. *Sterling v. Brig Jennie Cushman*, App., 636.
15. The harbor regulations of the harbor of Bangor require that no vessel shall come to anchor in the channel within certain limits; in this case it was found that the libellant's vessel was anchored in a proper place, had the proper light, and that her owners were entitled to recover of the respondents, in accordance with the decree of the District Court which was affirmed. *Ibid.*
16. Inevitable accident in collision cases is never admitted as a defence, except when it is shown that neither vessel was in fault. *Ibid.*

See PLEADING, 7. INSURANCE, 13 - 18.

### COMBINATION.

See PATENT, 7 - 11, 27, 28.

### COMMON CARRIER.

1. Common carriers are not responsible for losses or damage which may happen to goods received to be carried, if the same result from the act of the owner. *Choate v. Crowninshield*, 184.
2. When goods are lost or damaged after their reception by the common carrier and before their delivery, the *prima facie* presumption is, that the loss was occasioned by the carrier's default. *Ibid.*
3. The legal effect of a bill of lading, affirming the goods to have been shipped in good order, is to raise a *prima facie* presumption that in all particulars open to inspection the goods were in that condition; but this does not preclude the carrier, in case of loss or damage, from showing that the loss proceeded from some cause which existed, but was not apparent, at the time he received the goods. *Ibid.*
4. The responsibility of the carrier does not extend to damages resulting to a cargo of cotton in bales, from moisture of the contents of the bales received previous to the time of lading, which could not have been discovered by the master, and where the vessel was in all respects seaworthy, and there appeared to be no want of ordinary care, skill, and energy on the part of the master, to protect the goods against such injury while on board the vessel. *Ibid.*
5. While cotton in bales was lying on the wharf, and while a vessel was loading with the same, it was discovered by the accidental opening of one bale that the contents thereof were wet. This fact was reported to the shippers, who said that the wet would do no injury, and the bale was thereupon tied up and placed on board. *Held*, that there was no evidence in the case to warrant the conclusion that the master had reason to believe any portion of the residue unfit for the voyage. *Ibid.*
6. While collecting the fares, the clerk of a steamer owned by the defendant inflicted personal injuries upon the plaintiff, on board the vessel during one of her regular trips. *Held*, the plaintiff could recover of the defendant for the injuries received, although the defendant did not authorize the acts of his employee. *Pendleton v. Kinsley*, 416.
7. The principles of law applicable to the relations of master and servant do not fully define the rights, duties, and obligations between carriers of passengers and passengers; they are not merely citizens bearing only toward each other the relations



which one citizen bears to another : the carrier had agreed to carry for hire the passenger from one place to another, and was responsible for any breach of the obligation he had assumed, that the passenger should not be ill used by himself or his employees. *Ibid.*

8. A dispute had arisen between the clerk and the passenger as to the latter's fare, but the question whether the defendant was liable for the injuries inflicted by his clerk upon the plaintiff was decided irrespective of that dispute, and as if none such had arisen. *Ibid.*

### CONFESSIONS.

1. An officer of the United States charged with the safe-keeping of public moneys was indicted as principal defendant under the act of August 6, 1846, for loaning such money so intrusted to him to certain persons indicted jointly with him. Before the jury were empanelled he pleaded *nolo contendere*. Certain confessions of his that he had loaned the public money were offered in evidence. *Held*, they were properly admitted to show that he had unlawfully loaned a portion of the public money, but not to prove that the other defendants ever advised or participated in the criminal acts. The other defendants were charged with advising and participating in the felonious acts, but neither the declarations nor acts of the principal defendant could be admitted to prove anything against them. *United States v. Hartwell et als.*, 221.
2. Acts, conduct, and declarations of each confederate made during the pendency of a criminal enterprise are competent evidence against all concerned in it ; but confessions subsequent to the crime can affect as evidence only a party by whom they were made. *Ibid.*
3. Evidence of his confessions to prove the guilt of the principal cannot be admitted under an indictment against the accessory, unless the guilt or antecedent conviction of the principal is alleged in the indictment. *Ibid.*
4. Conviction may accrue either by confession and pleading guilty, or by being found guilty. *Ibid.*
5. Where the guilt of the principal was admitted at the trial of the accessories, even if the confessions of the principal were improperly admitted, still a motion for a new trial ought not to prevail, because the record of the conviction of the principal was properly introduced and was *prima facie* evidence of his guilt at the trial of the other defendants. *Ibid.*
6. The legal effect of the plea of "*nolo contendere*" and "guilty" is the same as regards all the proceedings on the indictment. *Ibid.*
7. If the defendants in this indictment had been charged as accessories to the offence alleged against the principal, still the confessions of the principal were properly admitted to prove that he committed the offence. *Ibid.*

See ACCESSARY, 5.

### CONTRACT.

1. It is a general principle that if parties have contracted to sell and buy a specific article of personal property, of which weight, price, measure, and fitness are definitely prescribed, or if the terms of the contract provide suitable means by which those qualities or conditions may be ascertained, and the articles are in the state for which the parties contracted, the property passes *eo instanti*, by virtue of the contract, without delivery. *Audenreid v. Randal*, 99.
2. Where the terms of an executory contract of sale are agreed, and everything the seller has to do is complete, the buyer is entitled to the goods on payment or tender

- of the price, and not otherwise, when nothing is said as to the time of delivery or payment. *Ibid.*
3. If the goods are sold on credit, and the contract silent as to time of delivery, the vendee is entitled to immediate possession, and the right of property vests at once in the buyer, subject to the vendor's right of stoppage *in transitu*, if exercised before possession by the buyer. *Ibid.*
  4. As between parties, when the contract is complete, the property vests in the buyer; as to every one except the vendor, delivery of possession is necessary to every valid conveyance of personal property. *Ibid.*
  5. Where actual delivery is impracticable or impossible, symbolical delivery will be equivalent in its legal effect. *Ibid.*
  6. Mere words, however, in case of the impracticability of actual delivery, will not suffice to constitute delivery and acceptance of goods. Added to the language of the contract, there must be some act of the parties tantamount to a transfer and acceptance, as where by some act dominion over the goods is relinquished by the vendor, and they are put in the power of the vendee. *Ibid.*
  7. As against subsequent purchasers or judgment creditors, delivery is necessary, but where actual manual occupation is impossible, from the character or situation of the goods, it cannot be admitted that no legal delivery can be made. *Ibid.*
  8. Under such circumstances valid sale is sufficient to take the case out of the operation of the Statute of Frauds if it appear that the title becomes absolute in the buyer discharged of all liens of the vendor. *Ibid.*
  9. An offer of a bargain from one person to another imposes no obligation upon the one unless it is accepted by the other according to its terms. *Snow et al. v. Miles*, 608.
  10. Departure from or qualification of those terms invalidates the offer. *Ibid.*
  11. Until the terms of the agreement have received the assent of both parties, the negotiation is open and imposes no obligation. *Ibid.*

See DEMURRAGE, 1, 3, 5; EVIDENCE, 27; SALE, 1-7.

#### COPYRIGHT.

1. The word manuscript in § 9 of the copyright act does not include a picture, and the purchaser of a painting may acquire a title to the same by an oral contract with the lawful owner: the difference between "manuscript" and "painting" defined. *Parton v. Prang*, 537.
2. The consent of the author or proprietor in writing, signed in the presence of two credible witnesses, was not necessary under that act to obtain the right to reproduce, or chromo, a picture, provided such consent was fairly and understandingly obtained and for a valuable consideration. *Ibid.*
3. At common law the sole proprietorship of a manuscript is in the author or his assigns before publication, but an unqualified publication, such as is made by printing and offering copies for sale, dedicates the contents to the public, unless the sole right of printing, reprinting, publishing, and vending the same is secured by copyright. *Ibid.*
4. In communicating the contents of his manuscript, the author may prescribe limitations and impose such restrictions as he pleases upon the extent of its use. *Ibid.*

#### COSTS.

1. Both before and since the passage of the act of the 6th of February, 1863, costs have been allowed in this court to the prevailing party for travel and attendance. *Nichols v. Inhabitants of Brunswick*, 88.

2. Where a party is called and examined as a witness in his own behalf he is not entitled to travel and attendance as a witness. *Ibid.*
3. The expense of printing the record and evidence in an equity suit is, under the second additional rule of May 25, 1842, part of the costs, and properly taxable as such. *Jordan v. Agawam Woollen Co.*, 239.

DAMAGES.

See COLLISION, 8; HIGHWAYS, 3.

DEED.

1. Where an absolute deed is intended as a mortgage, a subsequent purchaser with notice, stands in the place of the equitable mortgagee. *Amory v. Lawrence*, 523.  
See EVIDENCE, 20; TRUST, 1, 2.

DEFENCE.

See SALE, 2-7.

DELIVERY.

1. Mere delivery of a bill of lading is not enough, without a distinct acceptance of the same by the purchaser, but anything which was intended to be so, and received as such, which actually puts the goods within the reach and power of the buyer; and among the instances of such actual delivery cited by legal writers, is that of the indorsement of a bill of lading. *Audenreid v. Randall*, 99.
2. This case is wholly different from that of the holder of an ordinary order, as the consignee of a bill of lading has such a property that he can assign it over, and acceptance in such case is acceptance of the goods, takes the case out of the operation of the Statute of Frauds, and vests the absolute dominion of the goods in the buyer. If it were otherwise, still in this case the plaintiff would be entitled to judgment, because the delivery of the bill of lading and the bill of coal were made at the date of the contract, and the defendant subsequently offered to pay the plaintiff a certain sum per ton to take back the goods, and release them from the contract, after which the defendants still retained the bill of lading and the bill of goods. *Ibid.*

See CONTRACT, 2-8; STOPPAGE IN TRANSITU, 1-6.

DEMURRAGE.

1. A vessel was chartered under a contract that she was to have "three working days to load" at the port of lading, and quick despatch in discharging at the port of discharge. On arrival at the port of discharge, the master notified the charterers, and was requested to call the following day, and received no orders as to his place of discharge till after the lapse of three days, when he went to the place to which he was directed. Nothing appeared to show that the delay was claimed as a matter of right by the consignees, but rather as a request voluntarily acceded to by the master. *Held*, that the libellant was not entitled to recover the rate of demurrage *per diem*, stipulated in the contract for the three days' detention. *Davis v. Wallace*, 123.
2. After reaching the wharf designated by the consignees as the place of discharge, the libellant's vessel was detained four days before the unloading was completed:

three by reason of the berth at the wharf being occupied by another vessel for whose departure the libellant was compelled to wait; one in consequence of the lack of teams to take the cargo away. *Held*, that libellant was entitled to recover the stipulated demurrage *per diem* for these four days of delay. *Ibid*.

3. The contract in this case contained a clause that the cargo should be "received and delivered at the ports of lading and discharging as customary." *Held*, that this clause referred to the manner of receiving and delivering the cargo, and had no reference to the question whether the libellant's vessel was justly required to wait her turn at the wharf, where she was ordered to discharge by the consignee. *Ibid*.
4. Consignees cannot select a place of discharge within a port which would necessitate greater delay in discharging than the charter allowed. *Ibid*.
5. Proof of usage at a port, in respect to the reception or delivery of a cargo, may be received to interpret the meaning of obscure or equivocal language in a contract, or in the absence of express stipulation, but demurrage is a matter of contract, the provisions of which usage cannot modify. *Ibid*.

#### DEPOSITION.

See EVIDENCE, 9.

#### DISTRICT JUDGE.

See BILL OF EXCEPTIONS, 2-7.

#### DUTIES ON IMPORTS.

1. Under the act of the 3d of March, 1865, the dutiable value of imported merchandise is the actual market value, or wholesale price thereof at the period of exportation to the United States, in the principal markets of the country from which the same was exported, without any addition for commissions, brokerage, costs of transportation, shipment, or transshipment, or other like costs in placing the goods on shipboard. *Cobb v. Hamlin*, 191.
2. Where goods are purchased in the foreign market in bulk, and subsequent to the purchase put into the packages, boxes, or coverings by the buyer for convenience or preservation, actual market value does not include such packing, under the act of March 3, 1865. *Ibid*.
3. The repeal of the paragraph in § 5 of the act of June 30, 1864, imposing a duty of ten *per centum ad valorem*, on lastings, mohair-cloth, etc., did not revive or leave in operation the corresponding provision, expressed in the same words, in § 6 of the act of July 14, 1862. *Butler v. Russel*, 251.
4. In the exposition of statutes the court aims to learn the intention of the legislature. *Ibid*.
5. If there are several statutes relating to the same subject, they are to be taken together and compared, as parts of one system. *Ibid*.
6. When accurately ascertained, the real intent of the legislature should always prevail, even over the literal sense of the terms employed, and to the exclusion of other rules devised by courts to aid in the accomplishment of that object. *Ibid*.
7. Repeals by implication of revenue and collection laws are not favored. *Ibid*.
8. In order to work a repeal by implication there must be a positive repugnancy between the provisions of the new and old law. *Ibid*.
9. Where the provisions of the old statute are revised in the later enactment, and

where the later statute was intended to prescribe the only rules upon the subject, the subsequent is held to repeal the former statute. *Ibid.*

10. When a revising statute covers the whole subject-matter of antecedent statutes it virtually repeals the former enactments, without any express provision to that effect. *Ibid.* •
11. Where some parts of the revised statute are omitted in the new law, they are not, in general, to be regarded as left in operation if it clearly appear to have been the intention of the legislature to cover the whole subject by the revision. *Ibid.*
12. The general rule is that a repeal of the repealing statute revives the original act. *Ibid.*
13. It could not be supposed that Congress would repeal the provision of the act of 1864, if they had supposed or intended that thereby the same provision in the act of 1862 would have been revived. *Ibid.*
14. It is the better opinion that by the repeal of the provision of § 5 of the act of 1864, the manufactures in question became dutiable under the preceding paragraph in the same section which provides that there shall be "levied and collected on bunting and all other manufactures of worsted," etc., not otherwise provided for, a duty of fifty *per centum ad valorem*. *Ibid.*
15. Although the act of March 2, 1861, does not enumerate shingles sawed, rived, or shaved, § 22 of the act provides that a duty of thirty per cent shall be collected on manufactures of wood, or of which wood is the chief component part, if imported from a foreign country, and not otherwise provided for, and the act of July 14, 1862, provides for five per cent *ad valorem* additional. *Held*, that shingles were within the said provisions of the revenue laws, and were not exempted by the Reciprocity Treaty with Canada, whence the importations were made. *Stockwell v. The United States*, 284.
16. Debt is the proper form of action for the recovery of the penalties sued for in this case. *Ibid.*
17. All penalties and forfeitures incurred in consequence of the act under which this suit is brought, may be sued for and collected as prescribed by the act to regulate the collection of duties on imports and tonnage. 3 Stat. at Large, 732, § 5; 1 Stat. at Large, 695. *Ibid.*
18. Recovery for the duties and double values may be had in the same case. *Ibid.*
19. Import duties are levied by act of Congress, and when the goods are imported without paying or accounting for them, the liability is complete for the illegal importation. *Ibid.*

#### ENLISTMENT.

1. If the recruit was under the age of eighteen years, his certificate under oath that he was of the age required for lawful enlistment, would not be conclusive as to the actual fact. *Seavey et al. v. Seymour*, 439.
2. The certificate of enlistment is not conclusive that the recruit was of age sufficient to enter into the contract. *Ibid.*

See HABEAS CORPUS, 1-5. EVIDENCE, 19. JURISDICTION, 3-7.

#### EQUITY.

1. The treasurer of the corporation, respondent, furnished to the assignee in insolvency of the complainant an incorrect and untrue statement of the account between them and the complainant, by which the assignee was induced to entertain a proposition to withdraw a suit of the complainant against the corporation, and which resulted in

the execution of mutual releases between the assignee and the corporation in respect to all the interest of the complainant. The complainant never assented to the proposition or the settlement, but they were procured with his assignee, by the false statement of the accounts by the treasurer of the corporation. *Held*, that the complainant was entitled to a decree, according to the prayer of the bill, unless the corporation had other defences which could be sustained. *James v. Atlantic Delaine Co.* 614.

2. The settlement being prejudicial to the complainant, the assignor, he was entitled to the residue of his estate, if any, in the hands of the corporation, after his debts outstanding at the date of the assignment were paid. *Ibid.*
3. By the extinguishment of the debts the assignee became the trustee of the complainant, and the latter became clothed with all the rights and powers of *cestui que trust*, to the same extent as the creditors previously had whose claims he had extinguished. *Ibid.*
4. The complainant was the proper party to come into a Court of Equity and pursue the trust estate, it appearing that it had been improperly parted with by the trustee. *Ibid.*
5. When the objects of the trust are fulfilled, equity will compel a conveyance to the *cestui que trust*, he being the sole beneficiary. *Ibid.*
6. The complainant agreed with certain firms to construct and put in operation a factory. To obtain and secure a loan of money from these firms, he executed a mortgage, with power of sale for breach of condition, to the treasurer of the company, as trustee for the corporation, upon all his stock and interest in the company. He also executed to the same firm, as trustee of the lenders of the credit, separate mortgages of the same kind upon his homestead and farm, together with other property. Subsequently failing, he made an assignment of his property. By the terms of the assignment the liability to the company was made a charge upon the assets named in the assignment, with directions to the assignee to apply all the assigned estate, as he could, to the fulfilment of the contract of the assignor for the building and equipment of the mill. The assignee made an arrangement with the company to furnish the money to forward the contract of the assignor, and charge the same to the assets in his hands. Under this arrangement the factory was completed. The assignor continuing embarrassed, the trustee was directed to advertise the properties for sale. The assignee failing to raise the amount necessary to meet the assignor's liabilities, wrote to the treasurer of the company, demanding a statement of the condition of the company, so that he could represent the assignor's stock in its true light and sell it for its true value. The trustee stated that such an account could not be given, and the assignee then obtained an injunction restraining the proposed sale of the stocks until the further order of the court. Certain of the mortgagor's creditors tendered to the company the amount of the mortgage debt which the company refused to accept, and the court passed an order enjoining the sale unless the trustee would file a stipulation not to enforce the mortgage against property subject to the lien of the complainant in that suit. Two suits were pending to redeem the properties mortgaged, and the order restraining the sale of the stock was in force when the sale of the homestead took place. On that day the trustee sent to the assignee a paper described as a statement of the company's affairs. He afterwards on oath acknowledged that it was transcribed from a private memorandum kept by him, and it nowhere appeared on the company's books. *Held*: That, being furnished as a copy from the company's books, it must be assumed that

the assignee received it as an official account and gave it full credence as furnished by the company's officers. *Ibid*, 622.

7. That the alleged statement was not only false, but furnished with intent to deceive and defraud by promoting a settlement prejudicial to the mortgagor and more favorable to the company than truth and justice would admit. *Ibid*.
8. That in such case the assignor is entitled to take the residue of the estate after his debts outstanding at the date of the assignment are paid. *Ibid*.
9. That by the extinguishment of the debts the assignee became the trustee of the assignor, and the latter clothed with all the rights of *cestui que trust* to the same extent as the creditors previously had been whose debts he had extinguished; and consequently the complainant could come into a Court of Equity and pursue the trust estate, it having been fraudulently or improperly parted with by the trustee, and that under the decretal order the complainant was entitled to redeem the mortgaged property just as her intestate might have done, if the settlement and release had never been executed. *Ibid*.
10. This case was twice referred to a master, but inasmuch as the exceptions which accompanied the respective reports made it necessary, if attempting to decide the case at this stage, for the court to adjudicate the whole controversy as if no reference had been made, the court again sent the whole case to the master with specific instructions for a statement of the accounts between the parties. *Ibid*.

See JURISDICTION, 1; PLEADING, 1; PRACTICE, 1-6; SEPARATION, AGREEMENT OF, 1-7; TRUST, 2; WILL, 1-4.

#### EQUITY OF REDEMPTION.

See STATUTE OF LIMITATIONS, 1-8.

#### EQUIVALENTS.

See PATENT, 7-11.

#### EVIDENCE.

1. Mere opinions of physicians that ill-health, subsequent to an injury, was occasioned by it, must be received with caution, and weighed in view of all the circumstances surrounding the case. *Nichols v. Inhabitants of Brunswick*, 81.
2. The obvious purpose of the act of July 16, 1862, as to the competency of witnesses in the United States courts, was to bring the State and Federal courts into a more harmonious course of decision upon this subject. *Robinson v. Mandell*, 169.
3. The effect of the act of July 2, 1865, was to produce diversity between the rules of decision, in the State and Federal courts. *Ibid*.
4. By the act of March 3, 1865, it is provided, that neither party shall be allowed to testify against the other, under the circumstances described in the act, unless called by the opposite party, or required to testify by the court. *Ibid*.
5. The several acts of Congress, as to the competency of witnesses, indicate an intent upon the part of Congress to legislate that evidence of title to real estate and rules of decision in all controversies affecting rights of property shall be the same in the Federal and State courts of the same State and district. *Ibid*.
6. Where an executor or administrator is a party under the law of this State, the other party cannot be admitted to testify in his own favor, unless the contract was originally made with a party who was living, and competent to testify, and there-



- fore the complainant in this case was not a competent witness to testify to any transaction with, or statement by, the testatrix. *Ibid.*
7. Equity acknowledges the rule that a representation made by one party for the purpose of influencing the conduct of the other party will in general be sufficient to entitle such other party, if induced to act upon such representation, to relief. *Ibid.*
  8. Such representations must be proved by the party who alleges they were made. *Ibid.*
  9. The objections were taken to the admissibility of a deposition : 1. That it did not appear that the magistrate had examined the deponent ; 2. That it did not appear that the magistrate had reduced, or caused to be reduced, to writing the deponent's answers. 3. That it did not appear that the magistrate had reduced, or caused to be reduced, to writing the answers of deponent in his presence. The return stated that, 1. "An examination on oath of the deponent was had before me." 2. Cross and direct interrogatories accompanied the commission, and the magistrate's return was, "the following are the answers," to the direct and cross interrogatories, and also that "the signatures of the deponent affixed to this deposition are in his handwriting, and made in my presence." *Held*, that as the magistrate was to permit no person other than a clerk to be present at the examination except himself and the deponent, and as it did not appear that a clerk was appointed, the presumption was that no one was present but the deponent and the magistrate, and, if not, then either the magistrate or the deponent must be presumed to have written the answers, and, if by either, the first and second objections failed. 3. The fact that the signatures affixed were those of the deponent and made in the presence of the magistrate is an answer to the third objection. *Stockwell v. The United States*, 284.
  10. Parol evidence as to the usage of trade is admissible relating to a written contract in two classes of cases : Where the evidence is offered to prove that the words used in the contract are employed in a peculiar sense in the particular trade to which the contract relates ; where the purpose of the evidence is to annex incidents to the contract in matters upon which the contract is silent. *Hearn v. New England Mutual Marine Insurance Co.*, 318.
  11. In the latter case, however, the peculiar meaning which it is proposed to attach to the words must not either expressly or by implication vary the terms of the written instrument. *Ibid.*
  12. Such evidence is admissible to define what would otherwise be indefinite and obscure, and always with a view to give expression to the presumed intention of the parties. *Ibid.*
  13. Under the policy in this case, parol evidence to the effect that it is the usage for vessels bound from Liverpool and back, to discharge at one port and then to proceed to a second port for a return cargo, was not admissible to avoid the effect of a deviation. *Ibid.*
  14. If admitted, it would extend the voyage and increase the risk beyond what the language employed warrants the court in believing the parties had in contemplation. *Ibid.*
  15. Depositions offered to show that on a voyage of this kind the vessel might, under a usage, go to a second port in Cuba to load, were admitted *de bene esse*. *Hearn v. Equitable Safety Insurance Co.*, 328.
  16. It does not establish a usage that vessels have the right to so go to a second port in Cuba and load, under a policy in the terms of this one, to show that Cuba charters from Liverpool and back contain an express stipulation that the charterers shall have the option of a second port of loading. *Ibid.*

17. Matter of contract and usage or evidence of usage are quite different. *Ibid.*
18. Correspondence between insurer and insured prior to the execution of the policy is inadmissible to vary the terms of the policy, but the court thought it proper to examine the letters. *Ibid.*
19. Upon an application for a writ of *habeas corpus* before the District Court, there was no defence that the recruit was awaiting a trial under a charge of desertion before a military court, and no evidence to that effect introduced before that court: *Held*, that at the hearing of the appeal before the Circuit Court, the suggestion that that fact was shown by the return could not avail the respondent, because the jurisdiction of the Circuit Court in this case was purely appellate. *Seavey et al. v. Seymour*, 439.
20. Repeated decisions of the Federal Courts have established the rule that oral evidence is admissible for the purpose of showing that a deed absolute on its face, was intended as a mortgage, and that the defeasance was omitted from mutual confidence between the parties. *Andrews v. Hyde*, 516.
21. The evidence to prove the agreement ought to be clear and satisfactory, as the rule is one of exceptional character in the law of evidence. *Ibid.*
22. Where the evidence to prove the agreement, was that of only one of the parties, the other having deceased, and was uncorroborated by any word or act of the other, proof of friendly relations existing between the parties is not sufficient where the evidence is otherwise subject to doubt. *Ibid.*
23. Where witnesses are not excluded on account of interest in the event of the suit, the rule still applies that their veracity or impartiality may be affected by such interest. *Ibid.*
24. Something is due in such a case as this, to the denials of the answer to the effect that the conveyances were not made as security for any indebtedness. *Ibid.*
25. Where the allegation of the bill is that certain real estate was conveyed to a deceased person as security for a debt, the complainant is not entitled to a decree upon the uncorroborated testimony of a single witness, and certainly not unless his statements are positive, and he appears to be without prejudice, bias, or interest adverse to the respondent. *Ibid.*
26. It is the settled rule in the Federal Courts that oral evidence is admissible to show that a deed absolute on its face was intended as a mortgage. *Amory v. Lawrence*, 523.
27. Where a contract was alleged to be shown by letters, it was *held* that all objection to their admissibility on the ground that they were not stamped — the act of Congress then requiring *contracts* in writing to be stamped — was waived by the annexing of the letters, without reservation, to the agreed statement of facts under which the case was submitted. *Snow et al. v. Miles*, 608.

See BILL OF EXCEPTIONS, 4, 6, 7. CONFESSIONS, 1 - 3, 5, 7.

#### EXPERTS.

See EVIDENCE.

#### FACTS, AGREED STATEMENT OF.

Objections to the form of an action are usually considered as waived by the submission of a case to the decision of the court upon an agreed statement of facts, unless such objections are expressly reserved for the consideration of the tribunal to which the submission is made. *Snow et al. v. Miles*, 608.

See EVIDENCE, 27.

## FORFEITURE.

1. Where goods are withdrawn from a United States bonded warehouse by fraud, the permit so obtained is a mere nullity, and the person perpetrating the fraud has no more right to the possession of the merchandise than if the same had been taken by force or had been stolen by him. *United States v. Barrels of Spirits*, 261.
2. Goods removed from a United States bonded warehouse by consent of the collector obtained by fraud are subject to forfeiture. *Ibid.*
3. Where a person purchases goods as agent for another, knowing that the same had been removed before the taxes were paid, from a United States bonded warehouse by fraud, the principal would be bound by the knowledge of the agent. *Ibid.*
4. The jury must find in such case that the agent was cognizant of the fraud at the time he made the purchase, else they would not be justified in finding that the principal was affected by the antecedent knowledge of the agent. *Ibid.*
5. Where spirits fraudulently withdrawn from a bonded warehouse were seized for nonpayment of the taxes thereon, after they had been mixed at a rectifying establishment with others belonging to the claimants, so that they could not be distinguished, it was *held* that the United States were entitled to a forfeiture of a fair proportion of the mixture, even though the mixture might have been innocently made, provided the jury were satisfied from the evidence, and under the instructions of the court, that the spirits fraudulently withdrawn would have been by law liable to forfeiture, if they had not been so mingled with others. *Ibid.*
6. The right of the United States to a forfeiture cannot be destroyed by the intermixture of the liquors fraudulently taken from the warehouse, with others not subject to forfeiture. *Ibid.*
7. If spirits liable to forfeiture in consequence of fraudulent removal from a United States bonded warehouse and for nonpayment of taxes, were fraudulently mixed with others by the claimants and belonging to them, in order to destroy the identity of the goods so fraudulently removed, then the entire quantity is forfeited. *Ibid.*
8. This rule is never applied where the goods can be separated and distinguished. *Ibid.*
9. If the claimants knew, when they made the mixture, that the spirits which they mixed with their own had been fraudulently withdrawn from the bonded warehouse, then the spirits seized would be liable to forfeiture. *Ibid.*
10. The rule might be otherwise where the effect of the intermixture was to convert the substances into a new species, unless the new species can be reduced to its elements. *Ibid.*
11. Wherever goods of a similar kind are innocently intermixed, so that they cannot be distinguished, and they are not substantially destroyed, as by the production of a different species, the several owners may reclaim their respective shares, and take possession of the same wherever they can find them, if they can do so without a breach of the peace, or they may bring trover for the value of their proportions, against the person in possession, after demand and notice. *Ibid.*
12. Under the act of July 13, 1866, where spirits on which taxes were imposed were found in the custody of the claimants, after fraudulent removal from the warehouse, with the taxes unpaid, it must be assumed, after a finding of the jury, like the one in this case, that the claimants held them for the purpose of selling and removal in fraud of the revenue. *Ibid.*
13. A purchaser of distilled spirits, ignorant at the time of the purchase that the

spirits had been fraudulently removed from a bonded warehouse, or that the tax imposed thereon had not been paid, acquires his title only by such purchase, and if the property in the spirits claimed by the vendor had been absolutely forfeited to the United States before the sale, then the vendee can acquire no title; but where the verdict of the jury had established the fact of the innocence of the purchaser and claimant, the question is whether the goods had been forfeited to the United States before the contract of sale. The liability of the goods to forfeiture in such case must be deduced from the acts of the first owner and seller alone. *United States v. Barrels of Spirits*, 308.

14. Forfeitures made absolute by statute relate back to the time of the commission of the wrongful acts prohibited by statute, and the title vests immediately in the government on the commission of the wrongful acts. *Ibid.*
15. But where there is more than one remedy provided by statute, and the government has an election to proceed for the forfeiture or in some other way not involving a forfeiture, the title to the property does not vest in the United States prior to the seizure or performance of some act which amounts to such election. *Ibid.*
16. Congress has the power to decide in what event a divestiture of title shall take place, and where the act declares without any election of remedies that forfeiture shall take place upon the commission of the wrongful act, the court must carry the provision into effect, even against innocent purchasers, where the title is consummated by seizure, suit, judgment, and condemnation. *Ibid.*
17. Where the language is doubtful, resort must be had to the ordinary rules of construction, and the rules of the common law applicable to the subject of forfeiture. *Ibid.*
18. The title of the wrong-doer remains unaffected by his wrongful acts until suit, seizure, and judgment or decree, but where the act of Congress so provides, and there is no election of remedies, the judgment or decree divests his title from the date of the wrongful acts. *Ibid.*
19. § 45 of the act of July 13, 1866, provides that "all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid, shall be forfeited to the United States, or may immediately upon discovery be seized, and after the assessment of the tax thereon be sold by the collector for the tax and expenses of seizure and sale." *Held*, that under this statute the judgment or decree only relates back to the date of the seizure, and does not overreach the title of an innocent purchaser acquired subsequent to the date of the wrongful acts and before the seizure. *Ibid.*

#### HABEAS CORPUS.

1. Under § 14 of the Judiciary Act, justices of the Supreme Court and District Courts have power to grant writs of *habeas corpus* where a person is imprisoned or restrained of his liberty, for the purpose of inquiry into the cause of the commitment; but the writ in no case extends to prisoners in jail, unless when they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are to be brought into a court to testify. *Seavey et al. v. Seymour*, 439.
2. Under that act a Circuit Court has no authority to re-examine a decision of a District Court. *Ibid.*
3. The first section of the act of February 5, 1867, confers upon all the Judges and Justices of the Courts of the United States, in addition to the authority previously

conferred, power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution or any law or treaty of the United States, and gives an appeal from the decision of an inferior to the Circuit Court. *Ibid.*

4. In case of the enlistment into the service of the United States, without the consent of parent or guardian, of a person under eighteen years of age, on a hearing under a petition for a writ of *habeas corpus*, parol evidence is admissible to show the age of the recruit. *Ibid.*
5. The return on the writ should be signed by the person to whom it was directed. The proper course is for the petitioner to make his answer to the return on the writ, and not to make his allegations in full in the petition. *Ibid.*

### HIGHWAYS.

1. The surface of a travelled street or highway, about two rods wide, in a village, was in all respects in good condition, and had been repaired from time to time by the town authorities. At a certain point by the side of the road was a cellar, about four feet deep, the line of the wall of which extended within the line of the street. No building had existed over the cellar for a period of about eight years, nor had the town, for about that period of time, erected or maintained any guard or railing against the excavation. *Held*, that this was not, under the statute of Maine, such a condition of repair as to be safe and convenient for travellers with teams, horses, and carriages. *Nichols v. Inhabitants of Brunswick*, 81.
2. An accident occurred at this point under the following circumstances: A person driving one horse in a chaise stopped near the cellar, and turned the animal to one side, in order to admit some one into the carriage. The driver then attempted to turn the horse sufficiently to bring him into the road, but the horse came back too far, and began to back; he then slapped the animal with the reins to start him forward, and the horse stopped, but the rear wheels were then passing over the cellar-wall, and the plaintiff, in attempting to jump out, was caught by the fender, and together with horse and vehicle fell into the cellar. *Held*, that these facts were not sufficient to establish the defence of want of the exercise of ordinary care on the part of the person injured. *Ibid.*
3. Under these circumstances, plaintiff was entitled to recover damages against the town for the injuries received in consequence of a defective highway. As to the amount, the plaintiff is to recover a just compensation for his injuries, which are to be estimated by an examination of all the facts of the accident, and of the plaintiff's condition in consequence thereof. *Ibid.*

### IMPORTS.

See DUTIES ON IMPORTS, 1, 2.

### INCOME TAX.

1. On May 1, 1866, a tax was assessed upon the income of the plaintiff's testatrix, from the 1st of January, 1865, to July 2, 1865, the day of the testatrix's decease. The amount of the tax was paid under protest, by the plaintiff, as executor, to prevent the distraint of property, and he brought suit to recover the amount. *Held*, that the tax was legally assessed against, and collectible from, the plaintiff as executor. *Mandell v. Pierce*, 134.
2. The liability in this case accrued in the lifetime of the recipient of the income, at

whose death it passes over to the executor or administrator, as a debt against the estate. *Ibid.*

3. When the recipient dies within the year, the return must be made by the executor or administrator. *Ibid.*
4. The tax is imposed upon the income of the property of the decedent, and the liability is not discharged because the decease occurs before the time appointed by law for making the return upon which the tax is predicated. *Ibid.*

See INTERNAL REVENUE.

### INDICTMENT.

1. The indictment averred that the alleged crime was committed in and on board of a certain ship called the Junior, then and there owned by and belonging to the four persons therein named, all of whom are alleged to be citizens of the United States, and also contained the further allegation that all the criminal acts of the prisoner were committed within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of the court, and out of the jurisdiction of any particular State of the United States. *Held*, that there is a sufficient averment that the Circuit Court had jurisdiction, and that the injured party was within and under the protection of the United States, and in the peace thereof. *United States v. Plumer*, 28.
2. In this record it sufficiently appears that the prisoner was permitted his right of challenge. *Ibid.*
3. By this record it sufficiently appears that the prisoner was present at the impaneling of the jury, and when the verdict was rendered by the jury. *Ibid.*
4. All the counts in this indictment held good; but granting that some are bad and some good, the verdict should stand. *Ibid.*
5. The use of the past tense in this record is no valid objection to the record. *Ibid.*
6. It sufficiently appears in and by the record that issue was joined. *Ibid.*
7. When the docket entries show that the list of witnesses was furnished the prisoner in a capital case, and the record shows that the prisoner acknowledged in open court, before the jury was empanelled, that he did receive it two entire days prior to that time, it sufficiently appears that such list was furnished as required. *Ibid.*
8. It sufficiently appears in and by this record of what felony the prisoner was convicted and for what he was sentenced. *Ibid.*
9. The designation "foreman," appended to the name of the person signing the indictment as such, is sufficient, as the designation "foreman" refers to the introductory clause of the indictment, and to the record, as verifying the legal inference that "foreman" means foreman of the grand jury. *Ibid.*
10. Under § 44 of the Bankrupt Act of March, 1867, it was objected to an indictment that it did not sufficiently allege that the accused had attempted to account for certain of his property by fictitious losses, and that he had secreted and concealed certain portions of his property, after the commencement of proceedings in bankruptcy. The indictment alleged that the defendant was lawfully adjudged a bankrupt; that after commencement of proceedings in bankruptcy he was required by the District Court to submit to examination on oath as to the disposal and condition of his property; that such examination was held; that the bankrupt was sworn to make true answers; and that he attempted to account for a certain item of property, with intent to defraud his creditors, by a fictitious loss. *Held*, that the objection as to the sufficiency of the allegation could not be sustained. *United States v. Crane*, 211.

11. An averment in the indictment that the defendant was lawfully adjudged a bankrupt was sufficient to admit the record. *Ibid.*
12. Such an averment is only a preliminary allegation to let in the record of the examination, which is itself a proceeding in bankruptcy. *Ibid.*
13. The objection that the averment of a conclusion is insufficient is not applicable to the one in this case, which was only essential to lay the foundation for the admission of the record to which it refers. *Ibid.*
14. If this were not so, then it would be necessary to set out the whole record in the indictment. *Ibid.*
15. Where in an indictment it was alleged in substance that the property falsely accounted for belonged to the bankrupt and was assignable under the Bankrupt Act, *held*, that such averment was equivalent to charging that the property was that of the defendant. *Ibid.*

#### INEVITABLE ACCIDENT.

See COLLISION, 10.

#### INFRINGEMENT.

See PATENT, 6 – 11, 17, 28, 29, 32.

#### INSURANCE.

1. A stock of sugars was insured under a time-policy, which contained the condition that if the property should be sold or conveyed in whole or in part, or if the policy should be assigned without the consent of the company, the risk should cease; but if the assured should sell the property, or part thereof, before the expiration of the policy, the same might be continued for the benefit of the purchaser, if the company gave their consent, to be evidenced by a certificate of the fact or by indorsement on the policy. Shortly after the date of the policy the assured sold the property to the plaintiff, and on the day of the completion of the delivery indorsed the policy to him as follows: "Payable in case of loss to Edward C. Bates." The policy was sent to the defendants with the request that they would approve the indorsement. It was approved in the following terms: "Consent is hereby given to the above indorsement." At the time of the loss the plaintiff had on hand a quantity of sugars equal to that which was owned by the assured at the date of the policy. *Held*, that the indorsements on the back of the policy were not a compliance with the conditions of the policy in case of sale. Under those conditions the policy would not continue for the benefit of a purchaser, and the consent of the company to the change of ownership must be evidenced substantially as required in the conditional clause. *Bates v. Equitable Fire and Marine Insurance Co.*, 215.
- 2 Upon sale of the property without the antecedent consent of the company the risk ceased, and the policy became void, unless the consent of the company thereto was subsequently obtained. *Ibid.*
3. The purchase was made, but the consent of the company to the transfer was not obtained, and they had no notice of it prior to the loss. They consented, in case the property of the assured was destroyed, they would pay the amount to the plaintiff, not that the policy should continue for the benefit of any one other than the insured. *Ibid.*
4. The defendant insured a vessel lost or not lost for the term of one year, taking the risk at sea, and in port, in dock, and on ways, with permission to sail with or without pilots, and to tow and assist vessels in all situations. Liability not to attach for any breakage of machinery or bursting of boiler unless caused by stranding or



collision. The underwriters were to be liable if the vessel should take fire, and any part of the machinery or boilers was thereby damaged. When insured, the vessel was laid up. After insurance she was chartered to the United States government to be used as a government transport, but not to go to any place where there was not sufficient depth of water for her to go in safety. She was sent by a military officer of the United States to Hatteras Inlet. When starting for that place her destination was not known to her owner, but was to the charterers and their agents, as was also the fact that she was to cross the bar at the Inlet. She proceeded to her destination, and remained outside the bar until ordered from a government tug to follow the tug over the bar. In following the order she struck on the bar, was driven among breakers and became a complete wreck. The order to cross the bar was from the military commander of the expedition acting under the authority of the government of the United States. The draught of the vessel and the depth of water on the bar were known to the master of the tug. The water was so shoal that a vessel of the size, draught, and build of the insured one could not reasonably be expected to cross in safety, and such striking would naturally result in her loss. There was a strong wind and a high sea. The attempt to cross the bar was rash, hazardous, and unjustifiable. *Held*, the orders of the general commanding must be considered as if given by the President. But the United States were the charterers, and must be regarded as the agents of the owners, and the question was the same as if the owners themselves had given the order to cross the bar, instead of a military commander in the United States army, and the same consequences ensued, and that the plaintiff could not recover. *Williams v. New England Mutual Marine Insurance Co.*, 244.

5. Insurance money may be recovered where losses were remotely occasioned by the negligence or misconduct of the master of the vessel, if proximately caused by the perils insured against. *Ibid*.
6. But the insured cannot recover for a loss occasioned by his own wrongful act, or by that of any agent for whose conduct he is responsible. *Ibid*.
7. Policies of insurance are regarded as commercial instruments, and are liberally construed; but no evidence of any usage or custom can be admitted to vary or explain their terms when precise and clear. *Hearn v. New England Mutual Marine Insurance Co.*, 318.
8. The voyage was described in the policy as follows: "at and from Liverpool to port in Cuba, and at and thence to port of advice and discharge." *Held*, that "port" cannot be construed to mean "ports," or "port or ports," and the going to a second port in Cuba constituted a deviation. *Ibid*.
9. Whether the policy was drawn in accordance with the contract disclosed by the letters is not a question for determination in a suit at law; it must be understood in this case in this form that all negotiations antecedent to the date of the policy were merged in the written instrument. *Hearn v. Equitable Safety Insurance Co.*, 328.
10. The policy only authorized a voyage to a port of discharge in Cuba, and at and thence to port of advice. *Ibid*.
11. The terms in a policy of insurance were "to a port of discharge in Cuba and at and thence to a port of advice." *Held*, that the policy protected the insured in a voyage from the port of loading to a port of discharge in Cuba, and at and thence to the port of advice. *Ibid*.
12. It cannot be made to give any further protection without adding words to the contract. *Ibid*.
13. Where a vessel is insured, suffers loss and damage by collision with another ves.

sel, and recovers from the owners thereof upon the ground that such vessel was in fault and the cause of the disaster, the amount so recovered is no bar to a further recovery from the underwriters, if it can be shown that the amount recovered in the collision suit is not equal to what it cost to repair the damages consequent upon the collision. *New England Mutual Marine Insurance Co. v. Dunham*, 332.

14. If the insured acts with diligence and in good faith he may pursue his remedy against the colliding vessel, and then, in his adjustment with his underwriters, he is obliged to account only for what he received from the owners of the vessel in fault. *Ibid.*
15. The owners of the injured vessel may proceed and recover, and if they recover full satisfaction, or without suit accept satisfaction, such satisfaction is a discharge of all the parties liable. *Ibid.*
16. In this case the underwriters are liable for the damage by contract, and the vessel causing the injury, for a marine tort, and the party injured may elect against which he will proceed. *Ibid.*
17. The well-settled rule in collision cases is, in the Federal courts, that the damages assessed against the respondent shall be sufficient to restore the insured vessel to the condition in which she was at the time the collision occurred, and that there shall not in insurance cases be any deduction for the new materials in place of the old. *Ibid.*
18. While the District Court has jurisdiction of marine insurance, it is not exclusive in consequence of § 9 of the Judiciary Act. *Ibid.*

#### INTERNAL REVENUE.

1. The salary of a judge of a court of record, payable out of the treasury of a State, is not legally taxable as income, under the internal revenue laws of the United States; the government of the United States having no power under the Constitution to levy such tax. *Day v. Buffinton*, 376.

See FORFEITURE, 1 - 19; INCOME TAX, 1 - 4; SALE, 1.

#### JUDICIARY ACT.

See PRODUCTION OF PAPERS, 1.

#### JURISDICTION.

1. A writ of error does not lie from the Supreme Court to the Circuit Court in a criminal case. *United States v. Plumer*, 1.
2. A writ of error *coram vobis* does not lie in the Circuit Court in a criminal case, either from its own judgment or the judgment of the District Court. *United States v. Plumer*, 28.
3. Being without any common-law authority to try or punish offenders, except for contempt, they cannot exercise any power in a criminal case not derived expressly or impliedly from an act of Congress. *Ibid.*
4. No authority has been given in the acts of Congress to the Circuit Court to re-examine, by writ of error or in any other manner, the rulings or judgments of the District Court in criminal cases. No such authority is given by the fourteenth section of the Judiciary Act. *Ibid.*
5. By that section Congress only intended to vest the power to issue such other writs in cases where jurisdiction already existed, and not where the jurisdiction was to be acquired by means of the writ to be issued. *Ibid.*
6. Difference between the writ of error *coram nobis* and the writ of error *coram vobis* explained and illustrated. *Ibid.*

7. If the alleged error be in the judgment itself, and not in the process, a writ of error does not lie in the same court to correct it. *Ibid.*
8. The Circuit Court in this district has jurisdiction to grant relief under a bill praying for an account of certain funds received by a testator from the complainant, under a promise to invest the same for the complainant, where the testator died in Rhode Island, and his last will and testament was proved there, but administration was also granted in this State (Mass.), where the testator left real and personal estate to a large amount. *Walker v. Beal et al.*, 155.
9. The first proviso of § 20 of the act of February 24, 1864, does not vest the exclusive jurisdiction of applications of this nature in the Secretary of War. *Seavey et al. v. Seymour*, 439.
10. The act of March 3, 1815, repealed the act of December 10, 1814, which made the enlistment binding upon all persons under the age of twenty-one years as well as upon persons of full age. *Ibid.*
11. By the act of the 24th of February, 1864, the Secretary of War is empowered to order the discharge of all persons in the military service who are under the age of eighteen years at the time of the application for the discharge, provided it appears on due proof that such persons are in the service without the consent of parent or guardian, provided bounties, advance, etc., are first repaid to the government and the local authorities. *Ibid.*
12. But this does not give the Secretary of War exclusive jurisdiction of such applications. *Ibid.*
13. This provision giving the Secretary of War power to hear such applications, is not repugnant to, or a repeal of, § 14 of the Judiciary Act. *Ibid.*
14. Maritime liens are founded in commercial usage, and the proper remedy to enforce the same, whether arising from a marine tort or contract, is by a suit *in rem* commenced where the *res* is found. *Killam v. Schooner Eri*, 456.
15. Jurisdiction *in rem* is exclusive in the District Courts, but the suit may be instituted in the District where the *res* is found, irrespective of where the injury for which satisfaction is sought occurred. *Ibid.*

See BANKRUPTCY, 13.

## JURY.

1. Issues of fact in civil cases in any Circuit Court may be tried and determined by the court without the intervention of a jury whenever the parties, or their attorneys of record, file with the clerk a stipulation waiving a jury. *Hearn v. Equitable Safety Insurance Co.*, 328.

## LICENSE.

See PATENT, 1, 2.

## MASTER.

See SHIPPING, 1.

## MASTER IN CHANCERY.

See PRACTICE, 1 - 6.

## NEW TRIAL.

1. Where a motion for new trial is founded on facts not within the knowledge of the presiding justice, and not appearing on his minutes, it must be verified by affidavit, unless compliance with that requirement is waived by the opposite party. *Vose et al. v. Mayo*, 484.

2. No affidavit of merits is required where the motion is properly addressed to the minutes of the presiding justice, as where the motion is to set aside a verdict for error of ruling in the admission or rejection of evidence, or for refusing to instruct the jury as requested or for misdirection, or because the verdict was against law or against the evidence or the weight of the evidence. *Ibid.*
3. The theory in such cases is that all the matters of fact alleged are within the knowledge of the presiding justice, or may be verified by reference to his notes. *Ibid.*
4. Where the motion is founded upon alleged newly discovered evidence, or on the charge of misconduct by the opposite party or the jury in respect to the trial, it presents a preliminary question whether the facts are such as to make it the duty of the court to order notice to the opposite party and to direct how the proofs shall be taken. *Ibid.*
5. In all such cases the motion must be in writing, and must, unless the requirement is waived, be supported by affidavit. *Ibid.*
6. Affidavits of the witnesses to be examined cannot be considered a compliance with the twenty-second rule of the Circuit Court relating to motions for new trials based upon newly discovered evidence. *Ibid.*
7. The purpose of the rule is that the allegation of newly discovered evidence may be verified by the oath of the party or his attorney. *Ibid.*
8. Probable cause for the motion must be shown, unless waived, before the court can interfere and give notice to the other side or take any steps to prevent the prevailing party from applying for judgment on the verdict. *Ibid.*
9. Where the motion is properly verified by the affidavit of the party, *ex parte* affidavits of the witnesses are enough to warrant an application for notice to the opposite party. *Ibid.*
10. Such affidavits are not, without consent, admissible in the final hearing of the motion. *Ibid.*
11. For that purpose testimony must be taken in open court, in civil or criminal cases, by depositions as provided by the Acts of Congress, or by interrogatories and cross-interrogatories, or, by consent, the court will, in its discretion, appoint a commissioner to take the testimony and report it to the court. *Ibid.*
12. In this case both parties had acquiesced in the taking of affidavits of the witnesses to be examined, and the court therefore looked into the affidavits as if they had been admitted by consent. *Ibid.*
13. The motion, however, was denied, first, because the evidence was not newly discovered within the legal meaning of the phrase; second, because that which was offered was within the reach of the party moving, at the former trial, and was merely cumulative. *Ibid.*
14. Evidence offered, in order that the motion prevail, should afford a reasonable ground to conclude that it would be productive of a different result from the verdict once obtained. *Ibid.*

#### NONSUIT.

1. Judges of the Circuit Courts cannot direct a peremptory nonsuit, but the defendant, when the plaintiff's case is closed, may move the court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to warrant a verdict, and that, as matter of law, their verdict should be for the defendant. *The Merchants' National Bank v. The State National Bank*, 205.
2. The motion must be made at the close of the plaintiff's case, or the trial must proceed. *Ibid.*

3. The motion is not addressed to the discretion ; it presents a question of law, and the ruling of the court is a subject of exception. *Ibid.*
4. The motion by the defendant in this case, that the court instruct the jury that the evidence introduced by the plaintiff was not sufficient to warrant a verdict, was allowed, because it was *held* that the act of June 3, 1864, conferred no authority upon the cashier of the defendant bank to certify as good the checks described in the declaration. *Ibid.*

OPINION.

See EVIDENCE.

PARTNERSHIP.

1. One cannot claim property or the avails of it through the fraudulent acts of another without being affected by the act, especially if a partner, the same as if the act were his own. *Stockwell v. The United States*, 284.
2. Partners are liable *in solido* for the tort of one of their number, if the tort was committed by him as a partner, and in the course of the partnership business. *Ibid.*

PASSENGER.

See COMMON CARRIER, 6 - 8 ; SHIPPING, 1, 2.

PATENT.

1. The provision in a license to use a patented invention on machinery used in tanning was, that the defendants might enlarge their vats, or increase the number by paying an additional patent-fee in the same proportion as that stipulated in the license for the vats constructed at the date thereof. The defendants enlarged their tannery after license, and in the new part made new vats, in twelve of which they used the patented improvements. By the terms of the license the defendants acquired the right to make and use the improvement to the capacity of their tannery, embracing one hundred and sixty-nine bark vats, and containing sixteen thousand seven hundred cubic feet. They did not put the improvement into a third of the vats in their tannery at the date of the license, or use it in vats containing in the aggregate one half the cubic feet authorized. *Held*, that the plaintiff could not recover damages for the use of the improvement in the new part, as the defendants had not used the improvement to an extent greater than provided for in the license at the date thereof, or greater than the capacity of the tannery before it was enlarged. *England v. Thompson*, 271.
2. The defendants were empowered by the license to use the patented improvements up to the date of the expiration of the patent of earlier date. They continued, however, the use of the patented improvements after that time against the protest of the plaintiff. The defendants insisted that they had a right so to continue the use of the improvements covered by the first patent under the provision of the license to the effect that if they wished to continue to use such improvement during what remained of the term of the second letters-patent, after the first had expired, they might do so by paying an additional patent-fee equal to one half the amount agreed to be paid for the term which expired with the older patent, and that the only remedy for the plaintiff was assumpsit to recover the additional patent-fee ; but the court *held* otherwise, because, 1, the license expired with the term of the first patent ; 2, the stipulation in question was only an agreement to grant an extension of the license which the defendants might accept or not ; 3, if they elected to refuse the license and did not use the improvement, the plaintiff would have no cause of action. Therefore, if defendants elected to take the license, they must pay the required addi-

tional patent-fee before they could acquire the right to use the improvement beyond the term of the first patent. *Ibid.*

3. Letters-patent are issued upon the adjudication of a public officer, and the presumption is that the adjudication was correct. *Sands v. Wardwell*, 277.
4. Letters-patent, if in due form, when introduced in evidence, afford a *prima facie* presumption that the person named as inventor is the original and first inventor of what is therein described as the improvement. *Ibid.*
5. The burden of proof to sustain an opposite conclusion is therefore on the party attacking the patent. *Ibid.*
6. Upon the question of infringement the burden of proof is with the complainant. *Ibid.*
7. Technical equivalents do not belong to a combination of old elements. *Ibid.*
8. Such a combination is only an improvement upon what was before known, and without the new combination the whole would have been the property of the public. *Ibid.*
9. When such a combination is patented it is infringed by every subsequent combination of the same elements as those which compose it; and no subsequent combination is substantially different from the patented one, merely because it was in a single device different from one of its elements, provided such substituted device was at the date of the patent a well-known substitute for the omitted one. *Ibid.*
10. Subsequent inventors may obtain valid patents for combinations of the same elements as those which compose a prior one, provided the combinations are substantially different, and accomplish new and useful results. *Ibid.*
11. No person is to be treated as an infringer who does not use all the elements of a combination, unless the change is merely formal or colorable; and every subsequent combination is only a colorable change when not substantially different from the first. *Ibid.*
12. It was *held* that the reissued patent did not embrace the invention of Charles Goodyear, which was for curing the native rubber when combined with or in the presence of sulphur by submitting the same to a high degree of artificial heat, and also for a manufacture called vulcanized India-rubber, being a compound of India-rubber with sulphur chemically altered by a high degree of heat, because that invention was disclaimed in the original specification, and it was stated to be the chief feature of the invention to cure again vulcanized rubber and mould it into any desired shape, and because the reissue also stated that the value of vulcanized rubber ceased when the article made out of it was worn out, and that foreign substances might be mixed with rubber compound so as to form a substance having the properties of vulcanized rubber, but composed of cheaper materials. *Carew v. Boston Elastic Fabric Co.*, 356.
13. When the complainant in a patent suit has introduced his letters-patent in evidence, it affords a *prima facie* presumption that the alleged inventor was the original and first inventor of what is therein described as his invention. This is the case where the respondent is a patentee under letters-patent subsequent in date which are also introduced in evidence. *Goodyear Dental Vulcanite Company v. Gardiner*, 408.
14. The patentee filed his caveat in 1853. During the period intermediate between the filing of his caveat and his application for a patent the inventor was employed in making experiments and in perfecting his invention. The court *held*, that the evidence did not show that any invention was completed by an alleged prior inventor before the caveat was filed, and that whatever was done by him was done while in the employ of the patentee. *Ibid.*

15. The question of abandonment by the patentee having been fully examined in a former suit under the same patent, further discussion of it in this case was deemed unnecessary. *Ibid.*
16. The claim of the patent was for the "plate of hard rubber or vulcanite, or its equivalent, for holding artificial teeth." The respondent used hard rubber, as he found it combined or prepared by others, as a substitute for gold or other substance in forming the plate and for holding the teeth. *Held*, it was not necessary, in order to show infringement, to prove that the respondent used the hard rubber described in the hard rubber patent referred to in the complainants' specifications. *Ibid.*
17. The respondent used rubber for the plates as a substitute for metallic plates; he employed the same mechanical means in forming the plates, and for setting and adjusting the teeth, and heat to harden the rubber, and fit the product for practical use. *Held*, that infringement of the complainants' patent was shown, although he used a rubber compound with iodine and not with sulphur (as did the complainants), and under a different patent. *Ibid.*
18. The invention described in the specifications of this patent is not merely a discovery of a chemical process for preparing a described substance for use in forming plates to be used for holding the teeth, and one may be an infringer if he does not use every one of the ingredients of that process. *Ibid.*
19. Neither the correspondence between the commissioner of patents and the applicant nor the proceedings in the patent office, pending an application, are admissible as evidence to enlarge, diminish, or vary the language of the claim of a patent. *Ibid.*
20. Patents for inventions are, if practicable, to be so construed as to uphold and not to destroy the right of the inventors. *Ibid.*
21. Although an inventor has obtained a patent for a process, he may have another for the product. *Jones v. Sewall*, 563.
22. There cannot be more than one valid patent for an invention, nor can the grantee of a patent sustain an action upon another patent for the same invention, issued afterward. *Ibid.*
23. Separate patents for separate and distinct parts of the same invention are nevertheless valid. *Ibid.*
24. A patent is *prima facie* evidence that the alleged inventor had made the invention when the specification was filed. *Ibid.*
25. If the alleged inventor or patentee wish to show that the invention was made by the inventor previous to the filing of the application, it must be proved, as against another patent, that it had been reduced to practice as an operative invention. *Ibid.*
26. A patent for preserving green corn by severing the kernels from the cob so that the juices will be liberated, and the toughening of the kernels by cooking prevented, and then boiling the kernels and juices together in sealed cans, after the juices have exuded from the kernels, is valid, although a patent has been previously granted abroad for preserving certain vegetables, not including the mention of corn, or the severing of the kernels thereof, by boiling them in hermetically sealed vessels. *Ibid.*
27. Inventions pertaining to machines may be divided into four classes:—
  1. Where the invention embraces the entire machine.
  2. Where the invention embraces one or more of the elements of the machine, but not the entire machine.
  3. Where the invention embraces both a new element and a combination of elements previously known.
  4. Where all the elements are old, and a new combination, producing a new result, is made out of them. *Union Sugar Refinery v. Matthiesson App.* 639.



28. A person is an infringer of a patent of the first class who, without license, makes any portion of the machine; of the second, when the part new and patented is made or used; of the third class, when the new element or new combination is used; of the fourth, when the patented combination is pirated. *Ibid.*
29. The property of the inventor is the exclusive right which the letters-patent secure to him to make, use, and vend the thing patented. *Ibid.*
30. The reason that a patent, when introduced in evidence, is *prima facie* evidence that the patentee is the first and original inventor of what is claimed therein, is that it is issued upon the adjudication of a public officer charged by law with such duty. *Ibid.*
31. Where all the elements of a machine are old, the patentee cannot invoke the doctrine of equivalents to suppress all other improvements on the old machine. *Ibid.*
32. But he is an infringer who makes or vends the patented improvement with no other change than the employment as a substitute for one of its elements, a device well known in the state of the art to be such at the date of the invention, and which any constructor acquainted with the art would then know how to employ. *Ibid.*
33. Such substitution of one well-known element for another is a mere colorable evasion of the patent. *Ibid.*
34. Whether a witness has sworn falsely or not is a question for the jury, and if they find that he has wilfully sworn falsely as to a material fact, they may, if they deem it proper, disbelieve everything he has said. *Ibid.*
35. The presumption that the patentee is the original and first inventor of what is claimed in the patent, when introduced in evidence, extends, in the absence of the original application, no farther back than the date of the patent; and those alleging an earlier date must prove it by competent evidence. *Ibid.*
36. Where there is no evidence to the contrary, the presumption is that the patentee at the time of making his application for a patent believed himself to be the original inventor or discoverer of the thing patented. *Ibid.*
37. Crude and imperfect experiments equivocal in their results, and then abandoned and given up, shall not be permitted to prevail against an original inventor who has perfected his improvement and obtained his patent. *Ibid.*
38. It is not enough to defeat a patent to show that another had first conceived the possibility of effecting what the patentee accomplished, unless it appears that he reduced what he conceived to practice. *Ibid.*
39. If two machines, having the same mode of operation, do the same work in substantially the same way, and accomplish substantially the same result, though differing in form, shape, or name, they are the same. *Ibid.*
40. If the defendant's means of causing pressure at the nozzle of his machine were, at the date of the patentee's invention, known as a substitute for the means of causing pressure at the nozzle described in the patent in this case, and if this mode performed the same function as the patented one, and could, from a constructor's knowledge, be substituted for it, then the two means are substantially the same. *Ibid.*
41. The patent in this case is not limited to any arbitrary mathematical amount of pressure, but covers such degree as is capable of carrying out the described object of the patentee under the conditions described in the patent. *Ibid.*

See ABANDONMENT, 1, 2; PRACTICE, 1 - 10; PRIOR USE, 1 - 4; REISSUE, 1 - 7.

## PAYMENT OF MONEY INTO COURT.

1. Where the declaration contains the general counts in addition to a special count which may contain many causes of action, the payment of money into court, generally upon the whole declaration, is not an admission of the defendant's liability, upon the special count. *Snow et al. v. Miles*, 608.
2. By such payment the defendant does not admit any specific contract; the only effect is that he admits a liability on some one or more of the causes of contract set out in the declaration, not exceeding the amount paid into court. *Ibid.*

## PLEADING.

1. If the respondent have no personal knowledge of the matter set forth in any particular allegation of the bill of complaint, a denial by the respondent upon information and belief is sufficient to make it necessary for the complainant to prove the same. *Robinson v. Mandell*, 169.
2. Whenever the same plea may be pleaded, and the same judgment given on two counts, they may be joined in the same declaration. *Stockwell v. The United States*, 284.
3. It was held that shingles described in the warrant as the "growth and manufacture" of the provinces of Canada, were so described as to make their importation without paying duty a fraud on the revenue. *Ibid.*
4. The liability for receiving, concealing, or buying is founded upon a distinct act from that of illegally importing. An agent or a consignee may be liable for both, and the two counts may be joined. *Ibid.*
5. Where the warrant described the alleged frauds to be that defendants had at certain times committed frauds on the revenue by importing large quantities of shingles subject to duty by law, into the port of Bangor and other ports in the district, without paying or accounting for the duty to which the same were liable, it was held that the description was made with sufficient particularity. *Ibid.*
6. It is a defect in the warrant not to allege that the district judge became satisfied, by complaint and affidavit, that the alleged frauds on the revenue had been committed. This, however, could not avail the defendants in this case:—
  1. Because they did not at the trial except to the ruling of the court, admitting books, documents, etc. upon that ground.
  2. Because the books, etc. were properly admitted, even if the search-warrant were illegal. *Ibid.*
7. A general allegation of negligence in a collision case is, on the part of the libellant's vessel, not sufficient to constitute a valid defence even in pleading. Specification as to what was done or omitted and caused the accident must be made. *Killam v. Schooner Eri*, 456.
8. Reasonable presumptions are admitted by a demurrer as well as matters expressly alleged. *Amory v. Lawrence et als.*, 523.
9. The allegation in the bill was sufficient, although it did not state that the assignment of the claim against the trustee was under an order of court first made, because the presumption is that such sale was made in conformity to such order, and because independently of the assignment the bankrupt's title was good against all the world if the assignee elected not to take the property as not beneficial to the estate. *Ibid.*
10. Waiver by the bill of oath in the answer amounts to nothing unless accepted by the respondent. *Ibid.*

See PAYMENT OF MONEY INTO COURT, 1, 2. PRIOR USE, 4.

## POLICY.

See EVIDENCE, 13, 14 ; INSURANCE.

## POWER.

1. A power evidenced by a usage must be considered as defined and limited by that usage ; and if it appeared that a usage existed among certain banks other than the defendant bank for the cashier to certify checks upon them, it is doubtful if it could be regarded as evidence that the cashier of the defendant bank had any such authority. *Merchants' National Bank v. State National Bank*, 205.

## PRACTICE.

1. Upon the final hearing of a cause in equity, a final decree was entered, and the cause referred to a master, to take, and state to the court, an account of all gains and profits made by the defendants. No report was made by the master, but the following entries were made upon the docket: "May 27th. Master's certificate upon settlement of interrogatories, with state of facts, and schedule filed." "Roll containing nine drawings filed with certificate." "May 31st. Exceptions to master's certificate and report filed." *Ordered*, that the filings entered by the clerk be stricken out, and that the several papers filed be returned by the clerk to the master. *Union Sugar Refinery v. Mathiesson*, 146.
2. Explanation of the correct practice in this circuit, where a cause has been referred to a master to state an account. *Ibid.*
3. In case the decretal order was ambiguous, the master might have authority to report the case back for more specific instructions. *Ibid.*
4. The court might have power to revise each act of the master, as it progressed, but such a practice would be productive of delay, and will not receive countenance from the court. *Ibid.*
5. When a suit in equity has been heard, neither party has a right to file any paper in the cause, except by leave of court. *Ibid.*
6. The correct method is, for a master, if possible, to complete his investigations under the rules, make up his draft report, file it in the clerk's office, and give time for the parties to make their objections thereto. *Ibid.*
7. The correct practice is, where infringement to any extent is admitted, if the patent is held to be valid, to enter an interlocutory decree for complainant and send the cause to a master to ascertain the amount the complainant is entitled to recover. *Carew v. Boston Elastic Fabric Co.* 356.
8. Under the act of July 8, 1870, where a decree is entered for complainant, he may recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained, and the court may in its discretion assess the same. *Ibid.*
9. Profits are to be accounted for in such case by the respondent wherever the decretal order to that effect is entered, and if the injuries sustained by the complainant from the infringement are greater than the gains and profits realized by the respondent, then the complainant is entitled to recover compensation for the excess of the injuries beyond the amount estimated for profits of the respondent. *Ibid.*
10. Actual damages are assessed in the first instance, but the court may in its discretion increase the amount to a sum not exceeding three times the amount estimated and assessed as the actual damages sustained beyond the gains and profits realized by the respondent. *Ibid.*

See NONSUIT, 1 - 4. NEW TRIAL, 1 - 14.

PRESUMPTIONS.

See PATENT, 35, 36 ; PLEADING, 8.

PRIOR USE.

1. Previous use or knowledge of an invention abroad is no defence against a patent, unless such invention was described in some printed publication so clearly as to enable others to put it in practice. *Jones v. Sewall*, 563.
2. The use of an invention by the author thereof, for the purposes of experiment, though continued for more than two years, will not deprive him of his right to a patent. Neither will the sale of it for two years by others without his consent. *Ibid.*
3. Where an invention has, through the acts of the inventor, gone into public use beyond his control, his right is forfeited beyond recall. *Ibid.*
4. The defence that the patentee had allowed his invention to be in public use or on sale for more than two years before he applied for a patent, is distinct from the defence that he had abandoned it to the public, and should not be blended with it in the same pleading. *Ibid.*

PRODUCTION OF PAPERS.

1. The word "require" in § 15 of the Judiciary Act, when taken in connection with a subsequent clause, does not mean to include a power in the Circuit Courts to compel a compliance with an order to produce books or writings ; but if the party against which the order is passed shall fail to comply, then it shall be lawful for the court to give judgment, if against the defendant, the same as in case of default, if against the plaintiff, the same as in case of nonsuit. *Merchants' National Bank v. State National Bank*, 201.
2. At common law parties were not competent witnesses, and they could not be compelled to attend, by writ of *subpœna*, or bring with them any writings pertinent to the issue, by the writ of *subpœna duces tecum*. *Ibid.*
3. Notice to produce was at law the only method of a party desiring the production of papers by the other, unless he resorted to equity. *Ibid.*
4. Such notice, however, only laid the foundation for the production of secondary proof. *Ibid.*
5. The conditions under which the power to require the production of writings, etc. should be exercised are: the motion must be in a case at law ; the writings, etc. must appear to be in the possession of the party against whom the order is passed ; it must appear that they contain evidence pertinent to the issue, and that the circumstances are such that the party might be compelled to produce them, as provided in the section referred to. *Ibid.*
6. The order may be absolute or *nisi*. *Ibid.*
7. Production before the trial is not perhaps contemplated by the provision, unless there is just ground to apprehend that the writings may be destroyed, or transferred to another, or removed out of the district, in which cases the order should be made without delay, and absolute. *Ibid.*
8. In the case of incorporated banks having officers well known as the custodians of their books and papers, notice should be given for such officers to produce any document desired in the case. *Ibid.*

RAILROAD.

See BANKRUPTCY, 2, 3, 5, 6, 7.

## REISSUE.

1. Where an original patentee has deceased and his estate is under administration, his executor or administrator may make a surrender and obtain a reissue. *Carew v. Boston Elastic Fabric Co.*, 356.
2. The commissioner may allow the original specification to be amended in the reissue, and he may permit the applicant for a reissue to redescribe his invention, including in the new description and claims not only what was well described before, but also what was suggested or indicated in the original specification drawings or patent-office model. *Ibid.*
3. New features, ingredients, or devices, neither described, suggested, or indicated in the original specification or model, cannot be embodied in the new description. *Ibid.*
4. An inventor described his improvement in his original patent as a process for working over vulcanized rubber and moulding it into any desired shape ; and stated that in carrying the process into effect many foreign articles of less cost than rubber could be incorporated so as to produce a substance having all the valuable properties of vulcanized rubber at such reduced cost as to admit of its being applied to many more useful purposes. The description in a reissue stated that the principal features of the process consisted in applying heat by means of steam to rubber mixed with substances commonly used in vulcanizing rubber, or to rubber compound which has once been vulcanized either with or without the addition of fresh rubber, the same, whether the rubber or the compound, is or not pressed into moulds or dies of the desired form, and the steam introduced into steam-chambers or steam-jackets, and thereby conducted around the moulds or dies which come in contact with the compound to be moulded into the desired form. The corresponding passage in the original specification was in effect that the principal features of the new process consisted in applying heat either to rubber in its native state, or to rubber with the substances commonly used in vulcanizing rubber which has once been vulcanized by means of steam. The description further stated that the rubber compound while being heated was pressed into moulds or dies to give it the desired form. Also that the steam was conducted around all portions of the moulds or dies which come in contact with the rubber or compound to be moulded. Also, by this means the process of curing rubber was greatly facilitated, and vulcanized rubber which had before resisted all attempts to remould it was readily pressed into any desired shape. *Held*, that the substance of the two descriptions in these portions was the same, and that the original one sustained that of the reissue. *Ibid.*
5. It is the duty of the court to collect the intention and meaning of the inventor from the whole specification, and, if practicable, to adopt such a construction as will render the patent available for the purpose for which it was granted. *Ibid.*
6. Where one paragraph in a reissue specification would seem to lead to a construction which would make void the reissue, explanation of its meaning may be sought in a succeeding one. *Ibid.*
7. Where the process and purpose are plainly suggested and understood, and the language in an original specification is suggestive of new terms and names used in the reissue, such new names and terms do not show that the reissue is descriptive of an invention different from that set out in the original. *Ibid.*

See PATENT, 12.

## REPEAL.

1. In order to work a repeal by implication there must be a positive repugnancy between the provisions of the older and later statute. *Seavey et al. v. Seymour*, 439.  
See DUTIES ON IMPORTS, 7 - 14.

## SALE.

1. Where goods were sold, and the contract and account of sale and delivery completed in a State where a sale of that description of merchandise was prohibited by statute, the vendor is not entitled to recover the contract price, although he holds a license for the sale of such goods under the Internal Revenue Act of the United States, and although the internal-revenue tax upon such goods had also been paid. *Daniels v. McCabe*, 114.
2. The general rule is, that in an action to recover the price of goods sold, it is no defence that the vendor knew that they were purchased to be sold in another jurisdiction in violation of the law of that jurisdiction, provided it was not part of the contract that they should be used for that purpose, and provided also that the vendor neither did nor agreed to do anything in aid or furtherance of the unlawful design, beyond the mere sale with knowledge of the intent of the purchaser. *Green et al. v. Collins*, 494.
3. Contracts in evasion or fraud of the laws of any State are invalid in our courts. *Ibid.*
4. If it forms part of the contract that the seller shall do some act in furtherance of the illegal intention of sale by the vendee, such as concealing by packing the liquors, then the seller is a participant in the illegal transaction, and cannot enforce recovery. *Ibid.*
5. The vendor must yield no other aid to the intended illegal sale than the act of selling and delivery. *Ibid.*
6. If the vendor takes part in the adventure, he cannot recover. *Ibid.*
7. Sale in Rhode Island of liquors to be carried into the State of Massachusetts, of which vendor was aware. In the absence of anything on the part of vendor, except mere knowledge of the vendee's intention to sell the goods in Massachusetts, that sale was valid, and seller could recover in this court in Massachusetts, the sale being valid in Rhode Island, notwithstanding a statute in Massachusetts providing that no action should be maintained in any court of the State for the price of liquor sold in any other State for the purpose of being brought into this State. *Ibid.*

See CONTRACT, 1 - 7; STOPPAGE IN TRANSITU, 1 - 6.

## SEPARATION, AGREEMENT OF.

1. A husband and wife agreed to live separately. Certain property was transferred by the husband to trustees, to pay the income to the wife, upon condition that she should relinquish her claims of dower to purchasers of such portions of his other real estate as he should sell during coverture; and if she survived him, she should relinquish her right of dower in all the remainder of his real estate. *Held*, such a trust may be upheld in a court of equity. *Walker v. Beal et als.*, 155.
2. The agreement of separation in this case was not rendered invalid by the provision for its continuance, should the parties after the making of it elect to cohabit. Neither was it suspended while they lived together. It was evident from the conduct of the parties that they regarded the indenture as operative during their cohabitation. *Ibid.*
3. The indenture in this case was not solely based on separation. Temporary recon-

ciliation and cohabitation did not suspend its operation, because the parties had expressly covenanted that it should not. *Ibid.*

4. Unless it be assumed that the husband cannot be the trustee of his wife, in any case, it cannot be maintained under the indenture in this case that the trust property was wholly discharged of the trust, by the payment of the rents, income, etc. to the complainant, or that these, when paid by her to her husband, became his property. *Ibid.*
5. The husband in this case received from her the rents, income, etc. of the trust property, under an agreement to invest it for her and her children. Such an arrangement made the husband the trustee of the wife. *Ibid.*
6. The complainant was not precluded from setting up her claim by the indenture of compromise, she being a mere formal party to the adjustment, and the purpose of the instrument being to effect an adjustment between the heirs-at-law and the residuary legatees, and there having been no concealment of this claim on the part of the complainant. *Ibid.*
7. Acceptance by the complainant of the provision made for her in her husband's will is not inconsistent with her claim under the agreement of separation, because the declared intention of the testator was, that the amount secured to the complainant in the agreement of separation, coupled with the provision made for her in his will, should be in full for her separate maintenance, and in lieu of dower. *Ibid.*

#### SHIPPING.

1. Passengers do not only contract for room and transportation, but for good treatment, and it is the duty of the owners to use due care and exertion to protect them from any degree of violence, or kind of abuse or ill-treatment from other passengers, or the owners' servants or other persons coming on board during the trip. *Pendleton v. Kinsley*, 416.
2. The principal in this class of cases is liable for the misconduct of the employee, when it occasions injury to the passenger, whether arising from malice or neglect. *Ibid.*
3. Masters of vessels being selected by the owners, the latter are responsible for the qualifications of the former. Masters are required to possess and exercise reasonable skill and judgment in the discharge of duty. *Dutton v. Steam Tug Express*, 462.
4. Where a tow is lashed to the side of a steam-tug, and depends wholly upon it for motive power and steerage, the responsibility for the navigation of both is wholly on the tug. *Ibid.*
5. Where a vessel is drawn by a hawser extending from her forward part to the stern of the tug, both vessels have duties to perform, and it may then happen that either or both of the vessels may be in fault in case of accident. *Ibid.*
6. Where tow-lines are used the master of the tow is bound to obey all proper orders of the master of the steamer. *Ibid.*
7. If the master of the tow refuses or neglects such reasonable obedience, or fails in reasonable skill, or attention to his duty, the owners of the tug are not to be held responsible for the consequences. *Ibid.*
8. In this case the owners of the tug were held responsible for an accident to the tow, because the master did not pursue the channel in a river which he was requested and had tacitly consented to take, and because he had given, on entering the channel, confused and contradictory orders, which, it was held, led to the accident. *Ibid.*

See COMMON CARRIER, 6-8; INSURANCE, 1-17.



STATUTE.

See REPEAL, 1.

STATUTE OF FRAUDS.

See CONTRACT, 8.

STATUTE OF LIMITATIONS.

1. The claim in this case was barred by the Statute of Limitations. *Amory v. Lawrence*, 523.
2. The construction given to State Statutes of Limitations, by the courts of the States in which such Statutes are enacted, furnish the rule of decision in the Federal courts in cases where they apply. *Ibid.*
3. The Courts of Equity in Massachusetts apply the Statute of Limitation in suits in equity. *Ibid.*
4. The Statute of Limitations in this case began to apply when the complainant first became aware that the trustee had been repaid for his advances out of the proceeds of the sale or the rents and profits of the real estate conveyed to him, and knew what his rights in the premises were. *Ibid.*
5. The claim against the executors of the deceased trustee, for the balance in the hands of the trustee of moneys collected in execution of the trust, beyond the amount advanced and interest, was held to be barred by the Statute of Limitations, the complainant having known, twelve years before the filing of the bill, that the trustee had been repaid for such advance and interest. *Ibid.*
6. Six years is no bar to redeem a mortgage, nor is the plea of *laches* any defence to the suit, unless they are shown to have extended to the period of twenty years. *Ibid.*
7. Courts of Equity, in the case of a mortgagor coming to redeem, have fixed upon the term of twenty years after forfeiture and possession taken by the mortgagee, no interest having been paid in the mean time, and with no circumstances accounting for the neglect, as a period beyond which the right of redemption shall not be favored. *Ibid.*
8. Lapse of twenty years without any recognition of the complainant's rights to redeem the mortgaged premises, consisting of the undivided seventh part of the dower estate of the complainant's mother, and which the trustee in his lifetime conveyed to the last-named respondent, was not shown in this case. *Ibid.*

STATUTES COMMENTED ON.

June 3, 1864 . . . . .	Banking.
March 2, 1867 . . . . .	Bankruptcy.
Copyright Act, § 9 . . . . .	Construction of.
March 2, 1861 . . . . .	Duties.
July 14, 1862 . . . . .	"
June 30, 1864 . . . . .	"
March 3, 1865 . . . . .	"
December 10, 1814 . . . . .	Enlistment.
March 3, 1815 . . . . .	"
February 24, 1864 . . . . .	"
July 13, 1866 . . . . .	Internal Revenue.
February 5, 1867 . . . . .	Judiciary.
Judiciary Act, 14 . . . . .	Jurisdiction.

July 8, 1870 . . . . .	Patents.
July 2, 1865 . . . . .	Rules of Decision.
July 16, 1862 . . . . .	Witnesses.
March 3, 1865 . . . . .	Witnesses, Competency of.

## STEAM TUG.

See SHIPPING, 4-8.

## STOPPAGE IN TRANSITU.

1. The right of stoppage *in transitu* attaches to goods sold on credit, where nothing is agreed as to time of delivery. Then the vendee is immediately entitled to the property and the right of possession, but the latter is not absolute, being liable to be defeated if he becomes insolvent before he obtains absolute control. *Audetried v. Randall*, 99.
2. Where there has been a sale by the consignee, which would, independently of the indorsement of the bill of lading, as against the consignor, give title to the vendee, the effect of the indorsement would be to take away the right of stoppage *in transitu*, in cases where otherwise it would exist. *Ibid.*
3. Parties in Philadelphia consigned a cargo of coal to parties residing in Boston, to be delivered at Portland, and the consignees named in the bill of lading indorsed and delivered the same to the defendants, at their request, at a certain price per ton for the coal, with the right in the plaintiffs to draw for the amount at any time. *Held*, the terms of the sale were absolute, as also was the indorsement and delivery of the bill of lading, and defeated the right of stoppage *in transitu*, as against the purchaser. *Ibid.*
4. It would make no difference in this case, if the consignees named in the bill of lading were only agents of the shippers of the coal, because two days after the arrival of the vessel, and after the master notified the defendants that he was ready to deliver, the plaintiff approved the sale, and insisted that defendants were bound by the contract. *Ibid.*
5. It makes no difference in such case whether the consignee be the buyer of the goods or a factor. His transfer is equally capable of divesting the property of the owner, and vesting it in the indorsee of the bill of lading. *Ibid.*
6. Where there is no actual delivery, a sale of goods may be valid at common law, and the contract be within the Statute of Frauds; but if there be a delivery, though symbolical, sufficient to transfer the property even as against the creditors of the seller, and subsequent purchasers, and to the exclusion of the right of stoppage *in transitu*, there need not be anything more than would be sufficient to constitute a delivery, and to change the property at common law. *Ibid.*

## SUBPOENA DUCES TECUM.

See PRODUCTION OF PAPERS, 2-4.

## TORT.

See PARTNERSHIP, 2.

## TRIAL.

See JURY.

## TRUST.

1. The complainant, being indebted in a large sum, conveyed certain real estate to one Otis, upon an agreement with one Appleton, that he should pay the amount due the complainant's creditors, and take a transfer of the property conveyed, and account to the complainant for the balance left of the property after he had paid himself the amount advanced and interest. The trustee was to hold the property as security for the money advanced. *Held*, the conveyance, though absolute on its face, was, under the decisions of the Supreme Court, a mortgage. *Amory v. Lawrence*, 523.
2. After the trustee had been repaid, the rents and profits of the property in the trustee's hands was a debt or liability not under seal, for which the trustee was responsible to the complainant, and as such constituted a good cause of an action of contract or suit in Equity. *Ibid*.

See WILL, 5 - 10.

## USAGE.

See DEMURRAGE, 5; EVIDENCE, 10-14, 15-18.

## WILL.

1. In this case it was *held* that the alleged contract that the complainant and Sylvia Ann Howland were to exchange wills, and] neither to make any new will, without first returning to the other the will thus received, was not proved. *Robinson v. Mandell*, 169.
2. Where two persons agree to make mutual wills, and both execute the agreement, it is *held* that neither can properly make a will without notice to the other. *Ibid*.
3. Equity only interposes to enforce the agreement. *Ibid*.
4. In this case there was no competent evidence to show that there was any agreement as to the making of mutual wills, and there was nothing on the face of the instruments to warrant any such conclusion. *Ibid*.
5. The proviso of a will bequeathing all the testator's property to certain trustees was as follows: " Provided also that, if my said sons respectively should alienate or dispose of the income to which they are respectively entitled under the preceding trusts; or if, by reason of the bankruptcy or insolvency of my said sons respectively, or by any other means whatsoever, the said income can no longer be personally enjoyed by my said sons respectively, but the same or any part thereof shall, or but for this present provision would, belong to, or become vested in or payable to, some other person or persons, — then the trusts hereinbefore expressed concerning the said income, or concerning so much thereof as should or would have so become vested in or payable to any other person or persons other than my said sons respectively as aforesaid, shall immediately thereupon cease and determine. And the same income shall be applied to my said trustees during all the then residue of the life of my said sons respectively in manner following, that is to say, upon trust to pay and apply the said income, or such part thereof as aforesaid, to and for the support and maintenance, or otherwise for the use and benefit, of the wife, child, or children, for the time being, of my said sons respectively, or such one or more of such wife, child, or children, and in such manner as my said trustees in their discretion shall think proper, and as to such wife for her sole and separate and inalienable use; and in default of any object of the last-mentioned trust at any period during the life of my said sons respectively, and when and so often as the same shall happen, then,

upon trust, from time to time, so long as such vacancy or want of objects shall continue, to accumulate and invest the income aforesaid in augmentation of the principal or capital thereof in the nature of compound interest, with power of changing investments [as hereinbefore expressed; and in case, at any time after my decease, such accumulation should cease to be lawful, then, upon trust, to apply the said annual produce and income, or such part thereof as may not legally be accumulated during said want of objects as aforesaid, in such and the like manner as the same would be applicable under the ulterior trusts of this my will." *Held*, such provision was valid, and the life-interest given to the son ceased and determined at his bankruptcy. *Nichols v. Eaton*, 595.

6. Where trustees under a will have a discretion as to the manner of the application of the trust-fund for the benefit of a particular person, but no power to apply it otherwise than for his benefit during his life, his interest in case of bankruptcy passes to the assignee; but in this case the life estate was expressly determined by the act of bankruptcy. *Ibid*.
7. Such a provision as above recited passes the income from the bankrupt into the control of the trustees, for the benefit, at the trustees' discretion, of the wife or children of one or more of his sons; and if these objects fail, the trustees are required to retain the income, to accumulate and pass, after the death of the sons, under the ulterior trusts of the will. *Ibid*.
8. The will contained also the following provision: "And in case, after the cessation of said income as to my said sons respectively, otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay or to apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened." *Held*, under that clause no right vested in the bankrupt to any portion of the income which he could enforce in any court of law or in equity. *Ibid*.
9. These words conferred upon the trustees a power to be exercised or not, at their discretion, and one which, if exercised, exonerated them from liability for not applying such portion of the income under the limitations of the clause first recited; but the first clause controlled their action as to the whole fund, unless a portion was withdrawn from those limitations by the exercise of the discretionary power given them. *Ibid*.
10. Property in trust cannot pass to the assignee in bankruptcy where the will provides for an absolute cesser of the bankrupt's interest on the event of bankruptcy, if the will provides for the vesting of the interest in some other person. *Ibid*.

#### WITNESS.

See COSTS, 2; DEMURRAGE, 1-5; EVIDENCE, 2, 3, 5-8.



